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No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1942

LOUIS CAPONE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY OF THE STATE OF NEW YORK FOR A REVIEW OF A JUDGMENT OF SAID COURT CONVICTING PETITIONER OF THE CRIME OF MURDER IN THE FIRST DEGREE; AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK FOR A REVIEW OF AN ORDER OF SAID COURT AFFIRMING THE AFORESAID JUDGMENT OF CONVICTION.

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PETITION

LOUIS CAPONE, the petitioner, by his attorney, prays that a writ of certiorari issue to review the judgment of the County Court of Kings County, State of New York, entered December 2, 1941, convicting petitioner, together with two co-defendants, of the crime of Murder in the first degree (R.pp. 222-3), and the affirmance of said judgment of conviction on October 30, 1942, by the court of Appeals of the State of New York (which is the court of last resort in said state), by a vote of four to three, with one of the dissenting judges voting to dismiss the indictment against the petitioner (R.p. 4091). A motion for a reargument

was denied by the Court of Appeals on November 25, 1942 (R.p. 4121). A stay of the execution of judgment against the petitioner was granted by Honorable Owen J. Roberts, one of the Associate Justices of this Court, by order dated December 5, 1942.

STATEMENT

Petitioner was indicted in May, 1940, by the grand jury of Kings County of the State of New York for the crime of murder in the first degree (R.p. 21). After being held in custody for sixteen months, the trial commenced on September 15, 1941. It continued until and was concluded on November 30, 1941, upon which day petitioner was convicted (R.p. 3993) on December 2, 1941, petitioner was sentenced to the punishment of death in the mode and manner prescribed by law (R.p. 3997). From this judgment of conviction the petitioner appealed to the Court of Appeals of the State of New York (R.pp. 11-12) which affirmed the judgment of the lower court by a vote of four to three. Four separate opinions were rendered by said court, (R.pp. 4030-4091).

QUESTION PRESENTED

Whether the fact that all the defendants were prejudged by the community in which the trial was held by reason of an extremely intensive prejudicial and inflammatory newspaper campaign, the denial of a motion for a change of venue despite this condition, the continuous denials of motions by petitioner for a severance (R. pp. 2191, 2240, 2377, 2683, 2698, 2703, 2706, 2715, 3540, s.m.pp. 12, 13, 27, 59-60*) the make-up of the jury, the atmosphere

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*Smp. refers to typewritten transcript of all proceedings had prior to opening to jury.

in the courtroom, the prosecuting attorney's misconduct which was permitted and condoned by the trial court, and the unfair attitude of the trial court throughout the trial, were such deviations from prescribed trial procedure as to result in a trial so unfair that it constituted a mere pretense of one, and deprived the petitioner of his rights to a fair and impartial trial guaranteed by the United States and State Constitutions, and culminated in his ultimate conviction without due process of law, all of which required a reversal of the judgment of conviction?

STATUTES INVOLVED

The statutes involved are as follows:

1. Constitution of the United States, Fourteenth Amendment, Section 1;
2. New York State Constitution, Article 1, Section 2; Article 1, Section 6;
3. Section 749-aa of the Judiciary Law of the State of New York, subdivision 7.

HISTORY PRECEDING TRIAL AND DURING SELECTION OF JURY

The three petitioners were jointly indicted with Harry Strauss, alias "Pittsburgh Phil," James Feraco and Philip Cohen (Little Farvel), for the murder of Joseph Rosen, by shooting him on September 13, 1936 (R.p. 21). There is no suggestion that defendant Capone took part in the actual shooting.

When the indictment was found, or very soon thereafter, the petitioner was in custody, as were all of the prosecution witnesses who testified to matters allegedly concerning him. At that time there was no apparent valid reason for any delay of the trial as to him and the State of New York could have given him a fair trial. Instead,

petitioner was held in custody for a period of sixteen months before the case was actually moved for trial. In the interim, however, and immediately following the finding of the indictment, numerous newspaper articles appeared, most of them condemning petitioner's co-defendant Buchalter as a czar of crime and alleging him guilty of the murder in the instant case and many others, while at the same time idolizing the district attorney of Kings County who was being groomed as the Democratic candidate for Mayor of the City of New York.

In one article, in the New York Times on April 15, 1940 (prior to the indictment of Capone), based on an interview with the District Attorney of Kings County, he (the district attorney) referred to Capone as "the go-between who accepted orders from Lepke and other gangsters for murders they wanted performed and passed the orders to the actual killers" (R.pp. 97-8). Thereafter, on October 31, 1940, a similar article appeared in the New York Daily Mirror. These articles continued in various newspapers down to the date of and through the entire trial of the petitioners.

The wide extent, the intensity and the inflammatory nature of this publicity can be amply gathered from the few excerpts of these newspaper articles which are set forth in the petition and brief of the petitioner Buchalter. The evil in this action by the press was to inflame the entire community against the petitioners and condition it to think of them as guilty men; in other words, the result was that the petitioners were prejudged by the populace from which the jury which was to determine their guilt or innocence was to be drawn. Though this means was more subtle and orderly, it was no different in final result from being "rushed to conviction through • • • jury and judge being swept to the fatal end by an irresistible wave of public passion • • •."

But even though a small portion of this unprecedented flow of prejudicial, inflammatory propaganda directly mentioned petitioner, the balance thereof could not help but redound to the detriment of petitioner if he went to trial with his co-defendant Buchalter, against whom the great bulk of passion-arousing publicity was directed. If a joint trial were held in the face of this publicity, this petitioner realized that his fate, regardless of the proof against him, rested with Buchalter; that he would not have the benefit of the presumption of innocence; and that a conviction, again regardless of the proof, would result—though not by due process of law. Consequently, in June, 1941, petitioner moved for a severance of the trial as to him, setting forth the above as one of the grounds for his application (R.pp. 31-64). Such motion was denied, without prejudice, however, to a renewal thereof before the trial court (R.pp. 29-30). No appeal could be taken from this order under the Code of Criminal Procedure of the State of New York, but it was brought up for review on appeal from the judgment (R.p. 12).

In July, 1941, petitioner was advised that the trial would begin on August 4, 1941. By that time it was apparent that Judge O'Dwyer, the then District Attorney of Kings County, would probably be nominated by the Democratic Party as its candidate for Mayor of the City of New York. In this situation, and believing that he could not receive a fair trial because of, as previously stated, the unprecedented inflammatory publicity principally directed against his co-defendants, and that the candidacy would further minimize the possibility of a fair trial by casting the entire case into the arena of local politics, the petitioner herein joined in a motion made by the petitioner Buchalter for a change of venue. This motion was denied. The reason assigned by the Supreme

Court justice was that adverse publicity was statewide. No appeal could be taken from this order under the Code of Criminal Procedure of the State of New York, but it, too, was brought up for review on appeal from the judgment (R.p. 12).

On August 4, 1941, the case was called for trial before Judge Taylor (s.m.p. 28). There was a blue ribbon panel of 250 talesmen. The district attorney had then actually been nominated for the office of Mayor of the City of New York (s.m.p. 40). The trial judge was then a candidate for re-election (s.m.p. 43). Although the district attorney had requested a trial in August, before becoming a candidate, on August 4, 1941 an application was made by him for an adjournment to September 15th. Counsel for all of the petitioners strenuously objected to any adjournment, and stated they were ready to proceed with the trial on that day, and that they feared if the case were adjourned to the middle of September, when the active political campaign had started, it would become "a political football," and that if the Court desired to serve the convenience of jurors, a postponement should be granted until after election (s.m.p. 39-53). The court, however, refused to grant the request, and set the trial, over objection and exception, for September 15th, assuring counsel that the delay would be helpful because it would give the community an opportunity to forget the prejudice engendered by news hostility (s.m.p. 53-57).

However, a new series of articles appeared in the "Daily Mirror" (Brooklyn edition). These articles resulted in a renewal of the motion for a change of venue, which was denied without opinion. These matters are more fully set forth in the petition of the defendant Buchalter, and are, therefore, omitted herein, although made a part hereof.

On September 15, 1941, the application for an adjournment was again renewed, counsel for the petitioner herein requesting the adjournment in order to familiarize himself with the case and because of the impending Jewish Holy Days (s.m.p. 60). This motion was denied (s.m.p. 61).

Counsel for the petitioner thereupon renewed the motion for a severance, which was also denied (s.m.p. 59-60). This decision was not appealable, but was brought up for review in the appellate court (R.p. 12). Throughout the trial the motion for a severance was continuously renewed, and continuously denied.

The process of impaneling the jury commenced on September 15, 1941, and continued for a period of five weeks. This blue ribbon panel of 250, composed only of talesmen who had sworn that they were able to disregard newspaper impression, was exhausted, and a new panel of 100, having similar qualifications, was required before the selection process had been completed. At least one-half of the talesmen readily admitted that so fixed was their opinion and so strong their prejudice against "one or more of the defendants" in consequence of hostile newspaper propaganda that they could not sit as impartial jurors.

It is contended that the talesmen ultimately selected as impartial were prohibited by the court from expressing their true state of mind, and were inhibited by the trial judge from admitting their prejudice. Talesmen were threatened with excoriations by the trial judge if they admitted prejudice.

Under Sections 360 and 373 of the Code of Criminal Procedure of the State of New York the defendants collectively were entitled to thirty peremptory challenges of jurors. These thirty peremptory challenges were exhausted after nine jurors had been selected. The court erroneously overruled ten challenges made by defendants for cause

to talesmen obviously prejudiced. The court invoked a different standard for the prosecution and erroneously sustained at least six of the challenges.

The record will disclose that not one of the peremptory challenges exercised collectively by the defendants was due to any direct statement made by the prospective juror as to any implied prejudice against the petitioner Capone. The law, however, compelled petitioner Capone to join in with the co-defendants in excusing him. However, after the thirty challenges were completely exhausted, the two jurymen Rorke and Link were seated in the jurybox. They were obviously prejudiced. One was connected with the Mr. District Attorney program on the radio, and the other was a nephew of a prominent police official. Link had been previously excused by the same trial assistant in an earlier murder trial in which petitioner's counsel was the attorney for one of the defendants because, as then stated by the trial assistant, his employment would make it unfair to the defendant for him to sit on the jury. However, on this trial, where the thirty peremptory challenges had already been exhausted, he asked, in effect, whether the talesman would be prejudiced against him because *he* had excused him (Link) in the earlier case on the ground that he might be unfair to the defendant. Receiving a negative reply, Link was seated. Rorke was chosen against the background of the knowledge of the trial assistant that in this same earlier case Rorke, too, had been a talesman and had heard the name of the petitioner herein, and had been peremptorily excused because of his relationship with a New York police official. Thus this defendant was confronted with the first situation arising in the trial whereby he could and would have exercised peremptory challenges upon the denial of the court to excuse these talesmen for cause but was prevented from doing so, due to the failure to grant him a severance.

Petitioner respectfully asserts that a fair jury was not impanelled because it could not have been impanelled in the County of Kings in the month of September, 1941.

ATMOSPHERE SURROUNDING THE TRIAL

Coupled with the adverse publicity prior to the trial, during the selection of the jury and thereafter, the atmosphere in the courtroom throughout the trial unquestionably prejudiced the jurors' minds against the defendant.

On the very eve of the trial, there appeared in the Sunday Mirror, August 3, 1941, the following:

"LEPKE WILL GO TO TRIAL TOMORROW."

> "A heavy police guard will be stationed in Brooklyn tomorrow when Louis (Lepke) Buchalter goes to trial on first-degree murder indictment."
>
> • • • •
>
> "A police sergeant, 15 policemen and an unspecified number of plainclothes men have been detailed to guard the courtroom, corridors and the outside of the building." (R.p. 63)

With this prelude the trial subsequently began and the court immediately assumed the appearance of an armed camp, which continued throughout the trial. The existence of this condition is substantiated by objections made by defense counsel throughout the trial.

As soon as the People's star witness, the criminal, Sol Bernstein, was called to the stand, the following ensued:

> "Mr. Barshay: With your Honor's permission, may the record show that when this witness, Mr. Bernstein, came into the court room from your right he was preceded by a court attendant and he was followed by three men who I know to be detectives.

The Court: All right.

Mr. Barshay: Will your Honor note my objection to that proceeding?

The Court: I did not see it. I take your word for it.

Mr. Cuff: Two of them have their badges on now.

Mr. Turkus: Mr. McDonough is one of them; Mr. Harrington is another one standing to your Honor's left.

Mr. Cuff: May I have the name of the other gentleman who follows?

Mr. Turkus: Detective James Bell.

Mr. Cuff: And the court officer, to whom I have no objection. Mr. Meek.

Mr. Trukus: Is the objection to the protection of the witness?

Mr. Barshay: I object to the comment of Mr. Turkus. That was an unfair comment, and I ask the court to direct the jury now to disregard that and admonish Mr. Turkus not to repeat any such thing. There is no intimation that this witness in this court room or in any other place in this world needs any protection.

Mr. Turkus: You will know that before the case is over.

Mr. Barshay: I object to that comment.

The Court: The jury will disregard all side play.

Mr. Barshay: Side play on the part of the District Attorney, sir.

The Court: Please—

Mr. Barshay: May you say that, please?

The Court: Whichever side it comes from. The matter calls for no ruling.

Mr. Barshay: I ask your Honor——

The Court: You are dictating to the record. That is your right, but there is nothing that calls for a ruling. I do not know what it means, so please do not argue. Just proceed.

Mr. Barshay: Exception.

Mr. Rosenthal: May I have a ruling? In view of the atmosphere created insofar as the defendant Capone is concerned by having two police officers standing in an unusual position next to the jury box while the witness is testifying and the two court officers, one standing directly behind the witness and the other to his left, I ask for a mistrial upon the ground of prejudicial conduct against the defendant Capone.

Mr. Cuff: Defendant Weiss joins in that motion.

The Court: To get the record absolutely straight, let us have a survey of relative locations.

Mr. Rosenthal: All right, sir, I will take your Honor's statement as to where they are.

The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial.

Mr. Rosenthal: I respectfully except.

Mr. Cuff: I except.

Mr. Barshay: May I make a motion for the withdrawal of a juror and the declaration of a mistrial on the ground that Mr. Turkus made a prejudicial remark?

The Court: Denied.

Mr. Barshay: Exception.

Mr. Talley: I ask for the removal of the court officer that has been stationed directly behind the witness——

The Court: Denied.

Mr. Talley: —as he sits in the witness chair. He has not been there during the testimony of any other witness, and I object to this stage setting upon the entrance of this witness. I do not know what he is going to testify to, if anything, but I object to this display that has been occasioned be-

cause I regard it all as prejudicial to the defendant whom I represent and as unnecessary and unprecedented.

The Court: The court officer, George Meek, who is personally assigned to me as a judge of this court, in my chambers only, his place is right there or any place else that the court sees fit to put him, and it is nobody else's affair. Motion denied.

Mr. Talley: Does your Honor contend his place is directly behind the witness chair while the witness is testifying or about to testify?

The Court: Proceed.

Mr. Talley: I except to your Honor's refusal to grant my request." (R.pp. 686-90)

Thereafter, while the same witness was on the stand, the following occurred:

"Mr. Talley: Before I commence to examine this witness, I request your Honor to remove the court officer who stands within six inches behind the chair of the witness. I ask your Honor to remove from the sight of the jury the two detectives who escorted this witness to the witness chair. There is another officer standing, in uniform, immediately alongside of the witness chair. I have no objection to his standing in that general vicinity, but the other display I ask to be removed, as prejudicial to these defendants and interfering with proper cross examination and prejudicial to the defendants in this court room. There are plenty of detectives in this court room and there are other uniformed policemen who are kept outside of the court room. These three defendants are brought in here, in sight of the jury, in chains, literally in chains. There are three or four officers sitting alongside of these defendants, and I object to this display as unnecessary, unprecedented, and here for no other reason than to prejudice the jury, against these defendants. I ask that they be re-

moved, and that we proceed in a legal, judicial manner in the conduct of this trial from now on, and that we take away this theatrical display.

Mr. Rosenthal: I join in that motion.

The Court: Anything by the defendant Buchalter?

Mr. Barshay: We join in the motion.

The Court: All right, for the purpose of the record—the set-up is the usual one which is followed in this court in all cases so far as the Court can recall. When witnesses are brought in, in custody, detectives who are charged with the custody—that is, detectives or other officers or jailers who are charged with the custody, stand back in the corner, substantially out of sight of the jury, but close enough not to lose technical custody. Then the two attendants of this court stand, first the Judge's personal attendant, directly behind the prisoner witness, and next another one, in a position where he can guard the door, which is directly to the left of the witness stand and which opens into the Judge's chambers, and provides a means of escape. There is nothing unusual about this, so that is not considered seriously, and it is denied.

Did I understand you to say the defendants are brought in in chains?

Mr. Talley: Yes.

The Court: You mean they are manacled?

Mr. Talley: Yes, sir, manacled with these officers who are with them.

The Court: At the present time?

Mr. Talley: No, the manacles are removed when they come in the court room, but not before; when they are seated and not before; and your Honor requires the jury to be in their seats so they can see this spectacle of how these men are brought in.

The Court: Do you impugn the Court's honor? The Court does not require the jury to be in their seats in order to see 'the spectacle,' because the Court is not aware of it; and the Court has not been aware of it until you just informed the Court

to that effect. This compels, being before the jury, a ruling in the presence of the jury and that is, so far as the custodianship is concerned, until the defendants enter the court room and are seated it is not within the Court's jurisdiction, and is not under the Court's direction. That is a responsibility that is elsewhere charged. But at no time during the trial will the Court permit any defendant to sit here menacled, (sic) and, so far as the Court is informed by you, the defendants have not sat here manacled. That is overruled.

Mr. Talley: My objection is to their being brought into your court room menacled, (sic) and as soon as they enter the court room the manacle or manacles are kept on them until they are seated. Then they are removed. As soon as recess is declared the manacles are then put on and they are taken out, not merely with these three detectives who are sitting alongside of them now, but also preceded and followed by uniformed court attendants. Your Honor has direction of what happens in this court room, and it is what happens here that I object to, not what they do outside the courtroom and not in the presence of the jury.

The Court: These defendants have been brought into this court room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor, down a public staircase, and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say. Denied.

Mr. Talley: Exception. I take an exception to your ruling and also to your comment, as being prejudicial to these defendants.

I am now asking for my own information and not for any other reason, I beg to assure the Court: Are you going to continue to permit these defendants to be brought into this court room manacled, the manacles being kept on them until they are seated in their chairs?

The Court: The Court is not under examination as a witness and declines to answer the question. Please proceed with your examination.

Mr. Talley: Exception." (R.pp. 764-8)

While the witness Rubin was on the stand the following occurred:

"By Mr. Talley:

Q. Before this witness leaves the stand, may I have the record indicate that during the entire course of his testimony, a uniformed court officer stood directly behind his chair, within a foot, in the back of it; that two uniformed--another uniformed court officer stood within a few feet from him at the end of the jury box—and that during the entire testimony there was always a detective with a badge exposed on the lapel of his coat, standing also at the end of the jury box?

The Court: Well, the set-up is perfectly proper. The two uniformed court officers are here legally, and the Court refuses to conduct the court without proper discretion and place court officers where it sees fit. It is none of counsel's business, and the jury will disregard it.

Mr. Talley: I submit——

The Court: Do not interrupt. There is a detective against the exit door, between the court room and the public hallway.

Mr. Cuff: About two or three feet away from the jury box.

The Court: I will say he is almost in contact with it—behind the jury box—to one end; and that he is properly there. That door is going to be guarded at all times during this or any other trial this Court is engaged in. Now, the witness will be taken away.

Mr. Talley: I also ask your Honor to remove the picture which stood behind the witness chair through the entire course of this trial. It is en-

tirely unnecessary and was never once referred to by this witness, who has been on the stand three days. I don't think it belongs there.

The Court: Let us have the number of the exhibit.

Mr. Turkus: That is People's Exhibit 2 in evidence.

The Court: It is not prejudicial in any way, and the Court was unaware of its presence.

This might create an impression on the record which, upon reading, would make it seem that the defendants were not having a fair trial. That is nonsense. Take the exhibit away—turn it the other way. The jury is not supposed to see exhibits, apparently. It is quite large, is on an easel, and requires a man to lift it.

Now the record is the way it should be as to accuracy and fairness.

Mr. Talley: Exception." (R.pp. 1755-6)

While the witness Blanche Weiss was on the stand the following occurred:

"Mr. Talley: While there is a change in the guards, may I ask the Court to direct the officer to stand back from the witness, not directly behind the witness as the last officer did? May we have the court officer removed, or if he stands there, that he stand back against the wall and not against the chair of the witness?

The Court: That is incorrect in several details. He is behind the witness and almost flat against the wall.

Mr. Talley: The last officer who was just relieved stood within three inches of the back of the chair of this witness.

The Court: You should have called the Court's attention to it then.

Mr. Talley: I did not want to interrupt.

The Court: If your observation was accurate. It occurred to me just as was just stated." (R. pp. 3362-3)

GENERAL OUTLINE OF THE CASE

On September 13, 1936, at about 6:45 A.M., Louis Stamler, who resided across the street from Rosen's candy store (R.p. 328), heard a shot (R.pp. 322-3), looked out of the window and saw a car pull away from there. As the car pulled away he saw a bleeding man lying on the floor of the candy store (R.p. 329). He then looked back at the moving car and memorized its license number (R.p. 323). He ran down to the candy store, where he saw Rosen, the proprietor, on the floor. He yelled "Police!" and Patrolman Cappadora arrived in answer to the call (R.p. 325). He gave the policeman the number of the car and described it as a dark car (R.p. 326).

Patrolman Cappadora then notified the Telegraph Bureau to broadcast an alarm for a black sedan bearing license L-16-67 with three or more men in it and further notified the station house of what had happened (R.p. 335). Shortly thereafter an ambulance surgeon pronounced Rosen dead (R.p. 337). The body was removed to the Kings County Morgue (R.p. 338) where it was identified by Patrolman Cappadora (R.p. 338) and the deceased's son (R.p. 485).

An autopsy by Dr. Marten, Deputy Chief Medical Examiner, disclosed seventeen bullet holes in the body, some of which were entrance and others exit holes (R.p. 343). The cause of death was bullets perforating the skull, brain and lungs (R.p. 347).

PEOPLE'S THEORY OF THE ALLEGED MOTIVE

It was the contention of the prosecution that through the manipulations of the defendant Buchalter, Rosen had been forced out of a partnership in a clothing trucking business; that Rosen bruited it about in the clothing market that Buchalter had forced him out of business; that

because of Rosen's complaints in the industry Buchalter obtained a job for him with a trucking concern, which lasted a short time; that efforts by Rosen to obtain another position failed; that Rosen then opened a candy store at 725 Sutter Avenue, but still vociferously complained about what Buchalter had allegedly done to him and threatened to go to Thomas E. Dewey, Special Prosecutor appointed by the Governor to investigate racketeering, and tell what he knew about Buchalter; that Buchalter, through an intermediary, attempted to silence Rosen by giving him money to leave town; that Rosen left town, but returned in a few days and again threatened to appear as a witness before Dewey; and that Buchalter, exasperated at Rosen's continued threats, ordered his execution to silence him forever (R. pp. 234-9).

The defendant Capone was not connected or involved in any of the foregoing. Therefore, whether the People's evidence proved or failed to prove this theory will not be analyzed or discussed herein at length. However, all such evidence as to alleged motive, even though concededly not applicable to Capone, was of such prejudicial character that it indubitably affected the jury's consideration as to him and unduly prejudiced his rights to a fair trial.

The record of the testimony is voluminous. Comparatively little of it involved the petitioner. The mass of it so colored the trial and the error was so constant that the entire testimony appears in this transcript. For present purposes, however, a brief resume of pertinent testimony appears sufficient.

Proof in attempted substantiation of this motive, the events leading up to the commission of the crime and its eventual execution was presented through the witnesses Max Rubin, Paul Berger and Sol Bernstein.

1. MAX RUBIN

Though we quote his testimony, objections and exceptions were taken on behalf of Capone to the entire line of questions asked of him on the grounds that it was not binding on Capone, was too remote and extremely prejudicial (R.pp. 1289-90, 1311, 1351, 1377, 1381, 1388, 1394-5, 1745).

Max Rubin was an associate of Buchalter and, from 1932 to 1936, did work for him in connection with different unions and trade associations (R.pp. 1303-4). He was also the business agent of the Clothing Drivers and Helpers Union (R.p. 1305).

In October, 1936, Rubin fled the jurisdiction and went into hiding because of the investigation then being conducted by Special Prosecutor Dewey (R.pp. 1381-1420, 1685-1700, 1725-6). In this trial he insisted that the Rosen killing was another factor in causing him to flee (R.p. 1701). He admitted, however, that when he fled he had in mind the penalties he might pay in Manhattan; he felt there was nothing in Brooklyn for which he could be penalized (R.pp. 1725-6). But to reconcile his present stand, he contended that though there was nothing in Brooklyn to make him fearful, he was afraid of being framed by the Brooklyn district attorney (R.p. 1726). In August, 1937, he surrendered himself to Dewey by first sending his attorney, Edward C. Maguire, there to make arrangements; he did not send, nor did he personally go to Brooklyn at that time (R.pp. 1468-9, 1470, 1731-2). Towards the end of September, 1937, he testified before the Dewey Grand Jury (R.pp. 1478-9)—apparently telling all he knew. Because of being shot on October 1, 1937, Rubin was provided with a twenty-four hour police guard (R.p. 2392).

While under this guard and, on December 16, 1937, when he was talking freely to Dewey's men, he was questioned in Dewey's office by Assistant District Attorney McCarthy from Brooklyn with reference to the Rosen case in the presence of Dewey's assistant, Frank Hogan (now District Attorney of New York County), a detective and a stenographer (R.pp. 2392-3). Though the defense requested this statement for the purpose of cross examining the witness, the trial court only permitted the defense to have a portion hereof, on he ground that some of the balance was speculative and opinionative (R.pp. 2377-8, 2386-8). The portion of the statement which was made available to the defense disclosed that McCarthy offered Rubin complete immunity in the Rosen matter, but that Rubin rejected the offer because he was not involved in it; that Rubin denied any knowledge of the murder; that he did not implicate Buchalter, though he went out of his way to give assurance that he would if he could; and that when he fled the jurisdiction it was not on account of the Rosen shooting (R.pp. 2379-86). Rubin admitted having made all the answers contained in his statement to McCarthy (R.pp. 2394-2399). He contended, however, that this statement was untrue (R.pp. 2402-3); that despite the fact that at the time he was under twenty-four hour police guard and despite the fact that at the time he was telling Dewey everything he knew about Buchalter, he gave untrue answers to McCarthy through fear of Buchalter (who was a fugitive at the time), because he was shot following his testimony before the Dewey Grand Jury (R.pp. 2419-20).

The next time Rubin had contact with any Brooklyn official was in March, 1940, a month after he testified against Buchalter in another case in New York County (R.p. 1735). At that time he spoke to Inspector McDer-

mott and District Attorney O'Dwyer (R.pp. 1487-9). What he spoke about is not disclosed by the record. On September 25, 1941, after this case had been on trial for ten days, and over a year after the finding of the indictment, he specifically testified with reference to the Rosen case before the grand jury (R.p. 1736). But as the indictment had been found more than a year previously, the only palpable purpose for which Rubin testified before the grand jury was to obtain immunity.

Rubin's narrative, briefly, is as follows:

Over objection and exception that the matter was entirely too remote and wholly unconnected with the crime charged, he traced the leadership and internal affairs of the Amalgamated Clothing Workers Union since 1923 and was permitted, also over objection and exception, to name certain individuals who, without any official connection with the union, were on its "payroll," and to state that some of them had disappeared or were dead (R.pp. 1293-1320). The named individuals, other than being known to the witness, played no other part in the case. They were obviously gangsters, and in bringing their names into the case despite the fact that they weren't even remotely connected with it, makes it manifest that the district attorney's purpose was to cover the entire proceeding with an aura of union gangsterism and thereby prejudicially influence the jury's deliberations by subtly recalling to their minds all the lurid newspaper accounts for many years past relative to gang killings and depredations. Thus, though the decease of those named was not connected with Capone and had absolutely no bearing on the issue in this case, the district attorney in this manner was permitted to introduce highly prejudicial and inflammatory extraneous matter.

To continue with the narrative, Rubin then told about

the incidents in 1932 which allegedly led to Rosen's expulsion from business (R. pp. 1321-1338); about obtaining a job for Rosen with a trucking concern at $100 a week (R. pp. 1339-42); about the discharge of Rosen from his position about a year later for stealing (R. pp. 1342-3); about the unsuccessful efforts made to obtain another job for Rosen (R. pp. 1343-5); about Rosen's continuous complaints until some time in 1935, after the appointment of Dewey (R. pp. 1345-9); about then obtaining a new job for Rosen, after he had been out of work for sixteen months (R. pp. 1349-50); and about learning some months thereafter that Rosen had opened a candy store in Brownsville (R. p. 1350).

Rubin then recounted that in June, 1936, Buchalter complained that Rosen had threatened to go down to Dewey's office (R.p. 1355); that he made various efforts to placate Buchalter by telling him that Rosen was harmless; that in September, 1936, Buchalter made the same complaint to him about Rosen; that he further attempted to "straighten the thing out"; that he apparently failed in his mission; and that he was then instructed by Buchalter to inform one, Paul Berger, that he, Buchalter, wanted to see him (R.pp. 1356-67).

Other than the foregoing, the balance of Rubin's testimony concerned his peregrinations to avoid Dewey's investigations and, as he now claimed, being involved in the Rosen matter and his contacts and conversations with Buchalter relative thereto. It is significant to note, however, that in all his testimony relative to union affairs and the events leading up to the crime, ***Rubin did not implicate Capone in the slightest.*** The only mention he made of Capone's name was then he testified, over objection and exception, that he saw Capone in 1932 or 1933 in the company of Buchalter and Buggsy Goldstein (R.pp. 1461-2) and had a fleeting glance of him in 1935

when Capone went in and out of a room (R.p. 1463). On both occasions he did not speak to nor was he introduced to Capone (R.p. 1752), and Capone's presence had nothing to do with the instant case (R.p. 1752). He never saw Capone after this last occasion in 1935 (R.p. 1462).

Though Rubin's testimony obviously did not implicate Capone, still it seriously prejudiced him, particularly in the manner in which Capone was mentioned. For here again the prosecutor demonstrated his persistent efforts to have the case tried on newspaper gang stories rather than the indictment. When Rubin stated that he saw Capone in 1932, which certainly was not in connection with the Rosen matter, he was immediately asked who was with Capone at the time. Rubin replied that it was Buchalter. But this did not satisfy the prosecutor. He immediately asked who else was there, and Rubin promptly said, "Buggsy Goldstein" (R.p. 1462). As Goldstein had no connection with the instant case, it is impossible to discern what relevancy or legitimate function the prosecutor's persistent question had except to prejudice Capone by recalling to the jurors' minds a notorious case, which they must have read about, resulting in the execution of said Goldstein (*People* v. *Goldstein*, 275 N. Y. 376).

Because of the incompetency of Rubin's testimony against petitioner and particularly because of its extremely prejudicial nature, a motion for a severance was again made, but was denied.

2. PAUL BERGER

Paul Berger, too, was an associate of Buchalter's (R. p. 1801). He also was permitted, over objection and exception, to trace the affairs of the clothing union since 1927 and to name men unconnected with the case, who were obviously gangsters (R.pp. 1781-95).

Berger, himself, is a vicious character. He was on the union payroll as a "slugger" and strong-arm man, and blandly admitted beating up a good many people for years (R.pp. 1786, 1796, 1907, 1910-17, 1921, 2070-1, 2163). He readily admitted that on two occasions he pointed out Rubin to men who were intent upon killing him, of which intention Berger was aware at the time he did the pointing (R.pp. 2053, 2186-9).

Berger, like Rubin, also testified before the grand jury after the trial had begun and he, too, obtained immunity by refusing and failing to sign a waiver (R.pp. 1890, 2159, 2167).

Berger's story of the events before the killing commences at the point where Rubin's terminates. Berger testified that pursuant to Rubin's summons he saw Buchalter; that Buchalter took him to the defendant Weiss; that Buchalter told him to point out Rosen to Weiss; that he and Weiss departed from Buchalter and went to Brooklyn where he pointed out Rosen to Weiss (R.pp. 1803-11).

Berger protested vehemently, with a fine show of injured innocence, that he did not know he was pointing out Rosen so that he could be killed (R.pp. 2053, 2076, 2163-4); he thought Rosen was to be beaten up (R.pp. 2076-7). He readily admitted, however, that on the two occasions he had arranged to point out Rubin, he knew it was for the purpose of killing him (R.pp 1838, 2053, 2054, 2076, 2188-9). Although available, Berger was not arrested until June 5, 1941 (R.p. 1875).

Berger testified that he would not hesitate to lie in order to save himself from the electric chair or even from any trouble (R.pp. 2190-1).

Again because of the incompetency of Berger's testimony against petitioner and because of its prejudicial nature, a motion was again made for a severance and also denied.

3. SOL BERNSTEIN

Bernstein was the principal witness for the prosecution. He drove the death car and knew before he embarked on the venture that a murder was to be committed (R.p. 826).

Bernstein, who is thirty years old, has not done any honest work since he was eighteen (R.pp. 690-1). In 1930, at the age of nineteen (before he claims to have known Capone) he pleaded guilty in the County Court to unlawful entry, although charged with a felony (R.p. 938), and received a suspended sentence (R.p. 692). In October, 1933, he stole an automobile without anyone's assistance, and first pleaded guilty to a felony, but was then permitted to withdraw his plea and plead guilty to a misdemeanor (R.pp. 941-4), for which he again received a suspended sentence (R.p. 693). Although when first questioned by counsel for Weiss about this episode he denied the presence of guns in that car (R.p. 842), he finally was compelled to admit that there were guns and ropes to tie a person with in the car and that he was in the company of two stick-up men and the guns were to be used in the event of resistance (R.pp. 1044-6).

Though he claimed that he was not present at and did not know that a certain murder of one Yuran was committed in the mountains, he admitted helping to dispose of the murdered body (R.pp. 778-9, 1086-1102).

He went to California at the request of one Strauss, a co-defendant who had been previously executed on a conviction for another murder, to kill one Gangy Cohen (R.p. 1063). (This is the same Cohen against whom Bernstein testified on a first degree murder trial, which testimony Bernstein admitted, at the instant trial, was perjurious, which will be discussed in the brief to be submitted with the petition herein.) Bernstein also accompanied a notorious burglar and crook to California

and paid the attorney's fee for this crook when he was apprehended for a crime (R.pp. 1063-4, 1067-8). He also drove one, Fat Cooperman, to a doorway where he was killed, and although Bernstein protested that he had nothing to do with the murder, he admitted that he had not accidentally met Cooperman to take him home (R.pp. 1125-28).

Bernstein became a usurer, gambler and bookmaker at an early age, and, in fact, as he put it, "I was not an angel, does that satisfy you?" (R.pp. 786-7). He borrowed upwards of $50,000 from the Food Dealers Association for the use in his shylock business (R.p. 820). He was a strong-arm man in a gambling place in Florida (R.p. 965), and he threatened people who owed him money in the usury business and did not pay (R.p. 966). He conducted a candy store as a blind for his loan shark business, in which store burglars and other criminals congregated (R.pp. 1077-9). He followed carnivals and worked as a shill* for so long a time he could not remember (R.pp. 1068-70). He admitted he stole seventy-five automobiles (R.p. 825), and committed numerous other crimes, such as murders and "schlamming jobs" (R.p. 777). Schlamming, he explained, was beating someone over the head with a lead pipe (R.p. 1187).

Bernstein was not indicted for his confessed part in the Rosen murder (R.p. 780), since he testified before the grand jury (R.p. 797) without signing a waiver of immunity (R.p. 878). Although he acknowledged he knew he could not be prosecuted for this particular crime, he protested, with a too apparently assumed naivete, that he expected no consideration whatever for his testimony

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* A shill is a decoy or lure to entice victims into a crooked gambling game (R.p. 809).

(R.p. 877). He was granted immunity by testifying before the grand jury in the Yuran murder case (R.p. 1047). Aside from being held as a material witness he was not then charged, as he sat in the witness chair, with the commission of any crime (R.p. 1178). Since his surrender in April, 1940 (R.pp. 757-8), he has been confined to various hotels with some of the other prosecution witnesses (R.pp. 761-2).

On April 24, 1942, six months after he gave his testimony in the instant case, this professional criminal, a murderer, was discharged by the Kings County Court on the motion of District Attorney O'Dwyer. He goes scot-free! In addition, by way of reward, he received the sum of $2,223 of taxpayers' money, presumably as fees for being held as a material witness. It should be noted, however, that the amount of fees payable to a material witness in New York state is wholly discretionary with the County Judge before whom the matter is presented, and that during the entire period Bernstein was held as a material witness he was maintained at first rate hotels.

Bernstein testified that two days before the murder, in the presence of the petitioner herein, one Strauss instructed him to steal an automobile (R.pp. 702-3), and to return on the following day (R.p. 703); that on the following day he and the petitioner drove this automobile over a certain route which was being demonstrated by the petitioner, and which route the petitioner instructed Bernstein to follow to make the "get-away" after a murder was committed in a certain candy store pointed out by the petitioner (R.pp. 715-6); that on the following day he met all the co-defendants but the petitioner, the murder was committed, Bernstein drove the stolen automobile over the "get-away" route, at the termination of which he was met by the petitioner and another

co-defendant, and all the persons involved then drove away in different cars, abandoning the stolen automobile (R.pp. 732-51).

The foregoing is a succinct digest of Bernstein's testimony as given on direct examination. On cross examination, however, innumerable falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance were developed and cooly and unconcernedly admitted by Bernstein to such an extent that it would be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis Capone's guilt or innocence depends on Bernstein's word. In fact, though Bernstein stoutly maintained that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, he admitted that since that time he testified falsely in the Gangy Cohen trial, which was a first degree murder case. To quote from the record:

> "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir. I knew I was doing wrong." (R.pp. 797-8)

The full extent of these perjuries will be set forth in greater detail in the brief to be submitted simultaneously herewith.

The most glaring incident of Bernstein's deliberate perjuries and effrontery occurred when, at the beginning of his cross examination, Bernstein unequivocally stated (in order to demonstrate that the witnesses housed in the same hotel did not have an opportunity to confer on their testimony or to concoct a story) that since he had been placed in custody at the hotel he never wrote any letters to anyone, was not permitted to write or send out letters and never gave any to a detective, his wife or to any other person to mail (R.p. 975). However, much later in his

cross examination, when asked to write certain words and names, he realized that he was "caught in his own trap" and quickly admitted that he had written about four or five letters (R.pp. 1238-40).

Aside from the fact that the admission that these letters were written and mailed exploded the prosecution's tacit contention that the witnesses were under twenty-four hour surveillance and had no opportunity to concoct a story, the contents of the letters themselves (which the trial judge refused to admit into evidence for consideration by the jury) clearly demonstrate the viciousness of Bernstein's character, for the letters contained dire veiled threats to inform on certain people unless his, Bernstein's demands for money were met.

ONLY ALLEGED CORROBORATION AS TO PETITIONER: SEYMOUR MAGOON

To supply the necessary statutory corroboration of the self-confessed accomplice Bernstein, the prosecution introduced testimony by one, Seymour Magoon. He is equally as vicious, depraved and mendacious a criminal as Bernstein, though somewhat more cunning. He admitted to participation in two separate murders (R.p. 2470). He has followed a criminal career during his attendance at public school and continuously since that time (R.pp. 2513-4). He stole innumerable automobiles, shot two men—but protested that they did not die—, had beaten into unconsciousness a police officer, and had indulged in various other criminal activities. At the time of the trial, though he had confessed to two murders, no indictments were pending against him (R.pp. 2510-1). He declared that he would like to save himself from the electric chair, and in an effort to do so, he was testifying in the instant case (R.p. 2483). In fact, he expected a little

help for giving his testimony and was so told by district attorneys O'Dwyer and Foley, provided he told the truth (R.p. 2482). He protested, however, that he would not lie to save his own life. Asked whether he ever lied in his life, he replied, "only little white lies" (R.pp. 2514-5). This witness supplied an alleged admission as corroborative evidence in another murder case, tried about a year before this one. (*People* v. *Goldstein*, *supra*.)

He testified that in April, 1939, he spoke to petitioner with reference to a man named Friedman (R.pp. 2446-7). According to Magoon, he asked Capone whether he, Capone, thought it advisable that he (Magoon) work on the Friedman thing, because he hung out about a block away and thought he would be recognized (R.pp. 2460-1). At this point, upon being asked, Magoon stated that this was *all of the question* he asked of Capone (R.p. 2461). Upon stating that this was the finish of his question to Capone, Magoon was immediately excused from the court room while a lengthy discussion ensued among counsel and the court (R.pp. 2461-9). After an appreciable length of time, during which the jury was excused from the court room (R.p. 2463), and at the conclusion of this discussion, Magoon returned to the stand. He was thereupon asked the following question:

> "After you asked him that question, did he say anything to you? Did he, Capone, say anything to you?"

And despite the fact that before being excused from the stand Magoon had stated that the question he testified to was all of the question he asked Capone, this time he irresponsively interpolated as follows:

"I have not finished my answer on that." (R.p. 2469) He thereupon added the following to the question he testified he asked of Capone:

"I says, 'I hung out about a block away and it is sort of off Sutter Avenue.'" (R.p. 2469)

To this Capone replied, according to Magoon, "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." Magoon then replied that he was not worried; he was just asking advice (R.p. 2469).

In addition, Magoon also testified that in the Fall of 1938, two years after the murder, he was instructed in the presence of petitioner to follow the witness Rubin, ostensibly for the purpose of assassinating him (R.pp. 2434-53). On one occasion, when Magoon reported his progress, the petitioner, according to Magoon, stated "that Rubin is hurting Lep, and we got to hit him in the head and get rid of him" (R.pp. 2453-4). That was all that the petitioner said during the conversation (R.p. 2454). Magoon's task was then terminated when he reported that Rubin had a police bodyguard (R.pp. 2456-8). Parenthetically, it should be noted that the motivating reason for what the trial court called "the attempted assassination of Rubin" was in no manner connected with Rosen. Aside from the fact that the record fails to disclose any knowledge on the part of Rubin as to Capone's alleged connection with the crime, it is quite apparent, from the statement attributed to Capone, even if what Capone stated were true, that his only interest in the matter was to deflect harm from "Lep."

That, in brief, is all of Magoon's testimony which concerns Capone, excepting the circumstances under which it is alleged he disclosed the above information to the District Attorney.

In May, 1940, just as he completed a term for vagrancy, Magoon was taken to and lodged in the Concourse Plaza Hotel in the Bronx (R.pp. 2532-4), where he spoke

with District Attorney Foley (R.p. 2536), but did not tell Mr. Foley anything about the Rosen case (R.pp. 2539-40). Approximately two days after his first conversation with Mr. Foley, he spoke with Mr. O'Dwyer. At that time, somebody—he does not know whether it was a stenographer—was writing in a book (R.p. 2542). He did not, on this occasion, say anything about the Rosen case (R.p. 2543). A couple of months later, he was again questioned by somebody from the District Attorney's office in Brooklyn (R.p. 2544). During these two months, he was never asked any questions by the Bronx officials relative to the Rosen case, nor did he volunteer anything (R.p. 2546).

In July, he was taken to the Brooklyn District Attorney's office, where O'Dwyer, Klein and Heffernan were present (R.pp. 2546-7). While being questioned, somebody was writing—he does not know whether it was a stenographer (R.pp. 2547-8). But when these statements were called for, the prosecutor stated that there were no such statements (R.p. 2549). However, he signed many papers, which contained the substance of his questioning by O'Dwyer (R.pp. 2550-1). On this occasion, in July, 1940, he was not asked any questions about the Rosen case, nor did he volunteer anything about it (R.p. 2550).

Between July, 1940, and January, 1941, he was questioned by the Brooklyn District Attorney's office more than twelve times (R.pp. 2552-3). On some of these occasions, he saw somebody writing on paper (R.p. 2554). It was between January and June, 1941—he could not fix the date any better—that he first mentioned anything about the Rosen case (R.p. 2554). At that time, Turkus, Klein and a few others were present, and someone was writing while he was being questioned. He was questioned for a few hours and during that entire time, somebody was writing with a pencil (R.p. 2556). Again, these statements

were called for and again the prosecutor stated he did not have them (R.p. 2557). This should be compared with the testimony of Bernstein and Tannenbaum, both of whom testified that they were questioned about the Rosen case almost immediately after their arrest in the early part of 1940 (R.pp. 1185, 2335-7).

Altogether, Magoon spoke to the District Attorney's office about the Rosen case six or seven times; the last time was four or five months before he testified (R.p. 2564). However, he never testified before the grand jury about the case (R.p. 2562).

From the foregoing, two significant facts stand out: (1) that although arrested prior to the finding of this indictment (R.p. 2432), he did not testify before the grand jury; and (2) although he testified that he had made and signed a statement for the District Attorney of Kings County, the production of which was requested by defense counsel, the trial assistant stated to the court there was no such statement in the files (R.p. 2549).

The first item is of signal significance for the reason that it is quite apparent that insufficient evidence was submitted to the grand jury for the finding of the indictment. As Magoon was the only witness submitted by the prosecution through whom an attempt was made to supply the necessary statutory corroboration of the accomplice Bernstein, it is difficult to understand how the indictment could have been found without such proof being presented to the grand jury. In this connection it should be noted that though Magoon was never called before the grand jury (R.p. 2562), Rubin and Berger testified before that body while the trial was in progress (R.pp. 1736, 1880).

The second item is of equal importance. Magoon either told the truth with reference to the written statements he made for the District Attorney or he deliberately lied

about them. If he told the truth, the failure of the District Attorney to produce such statements or to explain why they were not produced is a strong indication that such statements would have been beneficial to the defense and detrimental to the prosecution and would constitute a suppression of evidence on the part of the district attorney.

Even though his pertinent testimony to the issue was brief in nature, yet glaring inconsistencies appeared between his testimony given in the Nitzberg trial, the Goldstein-Strauss trial, and between his direct and cross examination. See R.pp. 2572, 2580-1, 2439, 2586.

Taken in the light of his testimony that he evaded the law since he was a boy attending public school and his protestations that he never told anything but "little white lies," very little credence, if any, can be given to his testimony.

How ridiculous it is to assume that one so versed in crimes (including murders) since childhood, should seek anyone's advice as to what he should do when setting out to commit a crime! How peculiar it is that although Magoon was arrested and in custody for about a year and was questioned on innumerable occasions by the Brooklyn District Attorney, he made no disclosure of his supposed knowledge of the Rosen case until the expiration of that time! How strange it is that although he claimed to have made a signed statement regarding this crime, none now exists! How odd it is that Rubin and Berger should have been called before the grand jury while the trial was in progress, but not Magoon!

ONLY OTHER WITNESS MENTIONING CAPONE'S NAME: ALLIE TANNENBAUM

This witness' previous nefarious record will undoubtedly be described in the brief of the co-defendants. According to Magoon, who knew him since 1933 or 1934, Tannenbaum was a member of the so-called "Combination", and was seen by him frequently during the years 1933, 1934 and 1935, at the "corner" of Saratoga and Livonia Avenues, Brooklyn (R.pp. 2525-6). Tannenbaum and principal witness Bernstein, in 1937 or 1938, together, transported Yuran's dead body in a truck in the mountains (R.pp. 1087, 2228). Tannenbaum and witness Magoon were together in the Friedman murder (R.pp. 2229, 2434-5).

The only reason he is here mentioned is that when asked by the district attorney when he met Capone for the first time, lo and behold, he answered, "Not until the year 1938"—over two years after the murder of Rosen (R.p. 2234). He at no time heard the name of Capone mentioned, although allegedly present at a number of conversations in respect to the Rosen murder.

Take this testimony in connection with Rubin, who states he never saw Capone again after the supposed fleeting glance in 1935 (R.p. 1462), and we destroy what little doubt may still be left as to the falsity of the testimony of both Magoon and Bernstein regarding the alleged participation of Capone in this crime.

However, prejudicial error was committed by the trial court in permitting Tannenbaum, over objection and exception, to testify concerning persons whom he alleged he saw Capone in company with two years after the crime, since association so far distant from the date of the crime has no bearing and is incompetent therefor (R.pp. 2234-6).

As with the previous witnesses, whose testimony is analyzed herein, the only purpose for which this testimony

could be adduced was to create a prejudicial atmosphere against defendant Capone, and thus deprive him of a fair trial.

ARGUMENT

As the evidence now appears, the People's proof, if believed, shows that the persons allegedly involved had some connection with a Union, *but not Capone*, and that Bernstein, Strauss, Reles, Goldstein, Magoon, Rubin, Tannenbaum, Farvel Cohen and others all left town, *but not Capone*. Moreover, there is no proof of any mention of appellant Capone to Rubin, Berger or Tannenbaum by anyone, according to their stories. Although the District Attorney asked practically all of the witnesses called by co-defendants Buchalter and Weiss as to whether they were acquainted with various persons, including the other two defendants, not one was asked whether they knew the petitioner Capone.

In conclusion, Berger testified he would lie to save himself from the electric chair or any trouble (R.pp. 2190-1); Tannenbaum would like to escape the chair (R.p. 2341); and Magoon wants to escape the chair (but would not lie to do so), and "expects a little help for giving his testimony" (R.p. 2482) and further, in an effort to escape the chair he is testifying in this case (R.p. 2483).

SPECIFICATION OF ERRORS TO BE URGED

Petitioner was convicted of the crime of murder in the first degree and was condemned to death, not by due process of law, but in violation of his constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution, in that:

(a) The conduct of the trial throughout was so grossly unfair as to leave petitioner without even a remote outside chance of any free consideration by the jury of the evidence, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled to until his guilt is established by legal evidence beyond a reasonable doubt;

(b) Petitioner was deprived of his fundamental right to a fair trial by the denial of numerous motions for a separate trial, which compelled him to go to trial with a co-defendant against whom unprecedented inflammatory and prejudicial propaganda had been so extensively circulated so that an unbiased and unprejudiced jury could not be selected, which bias and prejudice redounded to the detriment of the petitioner herein;

(c) The denial of a change of venue to a community other than in which the trial was held was tantamount to being "rushed to conviction through * * * jury and judge being swept to the fatal end by an irresistible wave of public passion, so that no trial in the true sense was afforded (him)" and resulted in the trial being a mere semblance or pretense of one and not a trial by due process of law;

(d) Petitioner was deprived of his fundamental right to a fair trial in that, by reason of the inflammatory and prejudicial propaganda and notoriety which had been disseminated in the community in which the trial was held, and by reason of the erroneous rulings by the trial court on challenges as to the impartiality of talesmen, an unprejudiced and impartial jury was not obtained;

(e) The New York Court of Appeals erred in holding that the petitioner was not deprived of a fair and impartial trial by a jury composed of his peers;

(f) The New York Court of Appeals erred in holding that the atmosphere created both before

and during the trial by the presence of armed guards did not deprive the petitioner of his right to a fair and impartial trial guaranteed by the United States and State Constitutions;

(g) The New York Court of Appeals erred in holding that the misconduct of the prosecuting attorney, permitted and condoned by the trial judge, while an abuse which should have been strictly controlled, was not prejudicial to the petitioner and did not deprive him of a fair trial;

(h) The New York Court of Appeals erred in affirming a judgment based upon evidence admittedly—"not strong", without proper corroboration of the discredited and unreliable co-conspirator and where throughout the trial the prosecuting attorney had misconducted himself so as to deprive the petitioner of the fair trial to which he was entitled;

(i) The New York Court of Appeals erred in affirming a judgment where the unfair attitude of the trial court throughout the trial was such deviations from prescribed trial procedure as to result in a trial so unfair that it constituted a mere pretense of one.

REASON FOR GRANTING THE WRIT

It appears that the proof adduced by the prosecution against the petitioner was so weak as not to satisfy the standard set by the weight of authority in criminal cases. Further, while the proof was weak it came principally from the lips of a discredited and concededly unreliable accomplice, who although guilty of several murders, was permitted to go scot-free within a short period after the verdict was rendered against the petitioner. The alleged corroboration was furnished by an equally unreliable and discredited murderer who was never even indicted for his various crimes. His alleged corroboration, however, was wholly insufficient. This was an error of law which should be rectified.

The prejudicial atmosphere created before and throughout the trial rendered it impossible to procure a fair and impartial trial, and rendered utterly without force the presumption of innocence to which every person charged with criminal offense is entitled to until his guilt is established by legal evidence beyond a reasonable doubt. The inflammatory and prejudicial newspaper articles printed both before the trial and during the selection of the jury (while the prospective jurymen were at liberty), coupled with the armed guards present in the courtroom throughout the trial, and the petitioner's entry in and departure from the court room in manacles during the various recesses, aggravated the situation and further prevented the rendition of the verdict by a fair and impartial jury. In view of these circumstances the denial of a motion for a change of venue and the denial of various motions for a severance was an error of law which should be rectified.

The failure of the trial court properly to pass upon the qualifications of the prospective jury and in denying the motions of defense counsel to excuse a substantial number of prospective jurymen for cause, thereby exhausting the peremptory challenges accorded him by law, and at the same time using a different standard sustaining a substantial number of the prosecution's challenges for cause in the case of jurymen who would have been satisfactory to the defense, constituted an error of law which should be rectified.

The trial court in the instant case also permitted and condoned actions upon the part of the prosecuting attorney which prejudiced the defendant and prevented him from securing a fair and impartial trial. The trial court further aggravated this condition by refusing to permit defense counsel to object or except, in the presence of the jury, to the inflammatory and unfair statements of the

prosecuting attorney during summation, thereby depriving the jury of the knowledge of the improprieties of same. This taken into consideration with the obvious failure of proof explains the reason for the conviction of the petitioner.

The unfair attitude and statements of the trial court so prejudiced the rights of the defendant that he was further prevented from securing a fair and impartial trial. This taken into consideration with the obvious failure of proof further explains the reason for the conviction of the petitioner.

The course of the trial sanctioned by the Court of Appeals of the State of New York was so contrary to the usual and proper course of trial procedure that this court's power of supervision is petitioned to rectify the error. The injustice of permitting the judgment below to stand will appear clear.

These reasons have all been more fully developed and set forth in the brief annexed hereto and made a part hereof.

WHEREFORE, it is respectfully requested that a writ of certiorari issue to the County Court of Kings County of the State of New York for a review of a judgment of said Court convicting petitioner of the crime of Murder in the First Degree; and to the Court of Appeals of the State of New York for a review of an order of said Court affirming the aforesaid judgment of conviction.

Dated: December 31, 1942.

LOUIS CAPONE,
Petitioner

By Sydney Rosenthal
Attorney

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The County Court of Kings County wrote no opinion. The Court of Appeals of the State of New York handed down four separate opinions which are annexed to the record (R.pp. 4030-4091).

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered October 30, 1942. The jurisdiction of this court is invoked by reason of the deprivation of petitioner's rights under the Constitution of the United States, Fourteenth Amendment, Section 1; New York Sate Constitution, Article 1, Sections 2 and 6; and the constitutionality of Section 749aa of the Judiciary Law of the State of New York, subdivision 7. The constitutional questions were raised and passed upon in the court below (R.pp. 4098).

QUESTIONS PRESENTED, STATUTES INVOLVED, ETC.

A statement of the questions presented, the statutes involved, specification of errors to be urged, and a statement of the case will be found in the petition.

STATEMENT

The record below consists of 4029 printed pages in addition to 2783 pages of typewritten voir dire. In view of the length of such record, this brief and petition have been condensed so far as is consistent with a proper presentation of the questions involved, and at the same time preserve the rights of the petitioner.

ARGUMENT

I.

The main facts in the testimony involving Capone have

been set forth in the petition. They have, however, there been stated in a manner most favorable to the appellee. Still, it must appear obvious that the proof against Capone was extremely weak, even if credible.

The trial court admitted: "in mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses" (R.p. 3918). Judge Rippey of the Court of Appeals of the State of New York was of the opinion that "there was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed" (R.p. 4091). Judge Loughran of the Court of Appeals of the State of New York, one of the dissenting judges, stated "there is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone": and further, "No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testimony." (Referring to Bernstein (R.p. 4085). His opinion was concurred in by Judge Desmond. Chief Judge Lehman, one of the affirming judges, stated: "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendant's guilt from my mind" (R.p. 4078). Even in the prevailing opinion of Judge Conway, concurred in by Judges Finch and Lewis, it was stated, "The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believed the testimony of a witness who corroborated the accomplices. That witness was a criminal. The court properly left to the

jury the question whether they would believe or disbelieve him. That was peculiarly a jury question. We cannot say that the jury was bound as a matter of law to disbelieve him" (R.p. 4069).

This evidence emanated from the mouths of the witnesses Bernstein and Magoon. To evaluate properly their testimony, however, the inconsistencies, discrepancies and admitted perjuries therein contained are herewith set forth verbatim. This is done so as not to burden this court with the task of referring to the numerous such instances cited in the record. We will here clearly demonstrate the many falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance in Bernstein's testimony, which we believe are of such a nature that it would be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis Capone's guilt or innocence depends on his word. The mendacity of this witness was so obvious that the admonition in *People* v. *Kress* (284 N. Y. 542, 549) that an accomplice's testimony should be regarded "*with suspicion*" and "accepted only with caution" would be doubly applicable to him, if, indeed, it would not warrant disregarding his testimony entirely.

Although he testified that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, his testimony before the grand jury in the Rosen case was given prior to his testimony on the trial of Gangy Cohen in the Mountains. In regard to the testimony given in the Gangy Cohen case, he was asked:

> "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong." (R.pp. 797-8)

We will now set forth some of the glaring contradic-

tions between (a) his present testimony and testimony in the Cohen trial; (b) his present testimony and that given before the grand jury in the Rosen case; (c) contradictions not developed between grand jury and present testimony; (d) between his direct and cross-examination on this trial; and (e) contradictions in testimony on cross-examination.

We have no way of ascertaining the story he gave to District Attorney O'Dwyer since it was contended on the trial that he was never asked to put it in writing or make any statement, nor was any stenographer ever present when he was questioned (R.p. 1003). Contrast this fact with the written statements taken from Muggsy Cohen (R.p. 3063), defendant's witness Nat Sobler (R.p. 2847) and people's witness Rubin, taken by Assistant District Attorney McCarthy.

(a) Bernstein's Contradictions between present testimony and testimony in Cohen case.

(1) In the Cohen murder trial, he swore to tell the truth, but he did not (R.pp. 968-9; 1051-2); (2) he there swore that he never kept a bank account, but that was not the truth (R.pp. 969-972); (3) he there swore that he never threatened anybody, but that was not true (R.pp. 996-8); (4) he there swore that he never used an alias, and here admitted using numerous aliases (R.pp. 979-81; 1103); (5) he there swore he did not know the notorious Buggsy Goldstein, and here admitted he did know him (R.pp. 1019-20); (6) he there swore he knew the notorious Reles well, but here not so well (R.pp. 1027-8); (7) he there swore he stole one or two cars and was a reformed thief—here he was not reformed and admitted stealing 75 cars up to 1940 (R.pp. 1052-3; 827-8; 1047); (8) he there swore he had only seen one gun in his life and that was in the

year 1937, but here admits it was untrue (R.pp. 1056-9; 1061-3); (9) he there swore he had no business with the witness Tannenbaum (in the instant case), and here admitted having gone on criminal jobs with him (R.pp. 1085; 1087; 1091; 1104); (10) he there swore that he had pointed out the location of the axe used in another murder, but here denied same (R.pp. 1104-6); (11) he there swore he was never connected with Rosen or any other murder, but here admitted that he was (R.pp. 1111-13).

(b) Bernstein's contradictions between testimony in Grand Jury and this trial.

(1) Before the grand jury he swore that he drove the automobile along the route and Capone rode with him, and on the trial, he claimed Capone drove the car (R.pp. 1115-17; 1224-6); (2) before the grand jury, he swore that he rode with Capone at seven o'clock at night and here, stated it was four o'clock daylight (R.pp. 1227-8); (3) On this trial swore Capone told him to steal the license plates and Strauss said nothing, but before the grand jury, swore Strauss told him to steal the license plates and Capone said nothing (R.pp. 721-2; 1228-30); (4) before the grand jury stated that one Joe Pilch brought the guns over to the car, and on this trial secreted that fact (R.pp. 726; 1230-33)*; (5) on this trial claimed defendant Weiss had written the address of co-defendant Cohen's apartment on a slip of paper, and before the grand jury stated it was deceased Strauss (R.pp. 729; 1263-4); (6) on this trial stated co-defendant Weiss in-

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* Bernstein's equivocation regarding Pilch was evidently due to Pilch then being in custody as a material witness and the probability that he would not corroborate him. Pilch's testimony would have shown Capone's presence or absence from that meeting

structed him to return the stolen car to the garage; before the grand jury said it was deceased Strauss (R.pp. 729; 1264); (7) on this trial stated Weiss distributed guns, but before grand jury stated Strauss opened package and distributed guns (R.pp. 1266-7); (8) on this trial stated he told Capone about the theft of the car, but before the grand jury said it was Strauss he told (R.pp. 715; 1228).

(c) Contradictions (not developed on trial) between testimony and grand jury testimony.

By reason of a hurried, disconcerted reading of the grand jury minutes in the presence of the trial jury, because of the trial court's unwarranted refusal, over objection and exception, to grant counsel a reasonable recess in order to read same so that he might be in a position to cross-examine properly on that point, numerous other contradictions and changes were not brought out. A few of these instances are as follows: (1) Here he stated that on Saturday night Weiss told him to drive the car to Bradford Street where Capone had shown him (R.p. 726). In the grand jury, however, it was Strauss who told him this (People's Ex. Z-1 for Iden., p. 19); (2) here he stated that at 5 a.m., in Farvel Cohen's house, Weiss told him to get the car and meet them in the park (R.pp. 731-2); before the grand jury, it was Strauss (People's Ex. Z 1 for Iden. pp. 22-3); (3) here he stated that on the morning they were waiting for Rosen to open the store, Weiss told him to get the car and stop it in front of Rosen's store with the motor running (R.pp. 740-1). Before the grand jury, it was Strauss (People's Ex. Z-1 for Iden., p. 24); (4) here he stated that on the way over the bridge, after the stolen car was abandoned, Weiss gave him the gun (R.p. 746). Before the grand jury, Weiss never gave him the gun (People's Ex. Z-1 for Iden., p. 28).

Note—These changes are not just inadvertent, excusable errors. On the contrary, they evidence a studied effort to inculpate the defendants on the trial at any cost.

(d) Contradictions between direct and cross-examination.

(1) On direct examination he had testified that his first stolen automobile was without orders from anybody. On cross, however, contended that he had received orders to steal the car, and then, confronted with his previous testimony, admitted he had received no such orders (R.pp. 958-62); (2) He first stated he only heard that Herschel Bernstein was a crook, and thereafter admitted that he knew he was a notorious burglar and ace thief (R.pp. 1067-8); (3) he first stated that he did not know there were any guns in the car at the time of the theft, to which he pleaded guilty in 1933, and finally, admitted this was untrue (R.pp.1044-6).

(e) Contradictions in testimony on cross-examination.

His constant denial of writing letters while in custody and his final admission are more fully referred to hereafter.

The theory of the prosecution was that the witnesses called by them had no opportunity to concoct their stories; that Bernstein had become sanctified the minute he became a People's witness, and from then on could not lie and, in fact, had lost all of his vicious propensities.

In order to establish these facts, Bernstein testified that he was kept under surveillance twenty-four hours a day (R.pp. 829, 831), even to the extent of a detective sitting at his bedside while he slept (R.p. 1026), and had absolutely no opportunity to communicate with the outside world (R.pp. 975-6). Of course, the prosecutor did not call any police officer or credible person from an outside

source to establish that fact. Bernstein's final admission that these letters were written and sent out by him exploded the prosecution's theory that there was twenty-four hours surveillance over all the witnesses and no opportunity to concoct a story. The following are the letters:*

"THE HALF MOON HOTEL
near Sea Gate—Brooklyn, New York,
Esplanade 2-3800
Paul E. Fulton, Manager Walter Mc McKeean
as Trustee for Certificate Holders

Sunday.

Ben

I'm writing to you to show this letter to Cherry. I've waited long enough. I've been promised by you but you never lived up to it. So there is no sence of me taking your word. Now you are saying why I'm bothering you and not Malley. Well I'll tell you you are in the bussiness. There was money left over and you took care of it. Do you remember the last place I saw you in Jackie Leonards house. I had a talk with you. I asked your advise what to do. You told me to look out for yourself what did I get with them guys. Do you remember when I said I'm not going to talk when I gave myself up. Do you know why I turned rat on account of you and the rest that I've been together. So all of you wouldn't get in any trouble. I guess you are saying what kind of trouble can I get in. Do you know everytime somebody breaks there is plenty he talks about. Take for instance me they want me to tell everything I did and what

* The County Clerk erroneously failed to incorporate these letters in the printed record and the were considered by the Court of Appeals (See opinion by Loughran, J.) Because of their importance, the contents will be transcribed at length with the curse words deleted therefrom

ever I know. I'm standing up and keeping my mouth shut for what?"

(Defendants' Ex. P for Identification.)

(Emphasis by author.)

Sunday.

"Whitey

This is the last time I'm writing. You done me a favor you left $5 dollars with my wife. Now I found out why Mr. *Cherry* is so *brazen*.

I haven't got anything on him. You told my wife *10* years ago he fooled around with me I can't get him in any trouble. So now I see why I've been f—— around with that money he's in *bussiness, shylocking*. So he thinks that Im *dead fish*. Well it is a funny thing here I'm in trouble for being a *s*——. But *g*—— *damened* I'll make sure that Mr. Cherry will be the other *s*——. I'm just going to give a hint what I can do to *Mr. Cherry*. Well one instant. He forgets that he got plates with me in a——draw your answer. Do you know how many guys are pinched just for conversation. Why do you make me write like that I don't want to hurt you. Again I wan't to know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that *away*. So *Cherry* you [illegible] *making* me do this that I don't want all for $200 dollars. I just wan't to remind you *years* don't mean nothing to me. Because I'm just as good as dead. *Cherry* if my wife tells me she didn't get that money please go out of *town*.

Sol."

(Emphasis by author.)

(Defendants' Exhibit R Identification.)

Sunday

"Whitey

What the hell is this are you having me on sure thing? Is Cherry asking for trouble? Listen I wan't to remind him does he forget he is involved in a——he knows what I mean. And does he for-

get we done a lot of things together that I can give plenty of trouble? Lets be smart about this say he wants to be a wise guy and takes a lawyer what will it cost? Don't think I don't know what is going on I know Cherry is got a new *buddy Pete* the *Pollack* so you see I know a little. Now I'm raising it to $300 dollars and 5 every week. I want to tell you stop trying to outsmart me because I'm really burned on Cherry for the way he treated my wife in Weiners Bar Grill. Why didn't he take the whole floor so everybody can hear him. To-day is Sunday if my wife don't get that money when she comes to visit me. As true as my *mother* may she rest in *peace* Im going to make so much trouble for you that $300 will be only a *spit*. And you Whitey don't you go over my wifes house if you dont bring that money.

Sol.

P. S. And no payments. This time it is going to be one way or the other."

(Emphasis by author.)

(Defendants' Exhibit S Identification.)

These letters were definitely material to the issues involved, as they would not only have exploded the prosecution theory that there was no opportunity for the witnesses to concoct a story between themselves, but would definitely have established they were not under strict surveillance to the extent that they could not only write letters in peace, but could mail them to the outside.

Further, these letters would have clearly demonstrated that the halo placed on Bernstein was but a figment of the imagination and would have placed him in his true light before the jury—as a vicious unprincipled scoundrel, who, even while in custody, did not hesitate to threaten the outside world.

This error cannot be overlooked, and was of such a serious nature that it warranted a reversal. It was further aggravated by the Court's refusal to charge Ca-

pone's request in respect to opportunity among witnesses to converse and concoct stories, to which exception was taken.

"The Court: I will read that because I have a different ruling. It reads, 'I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them.'

The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.

Mr. Rosenthal: May I respectfully except?

The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.

Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.

The Court: I find that it is not. I find it is all guesswork.

Mr. Rosenthal: Then I respectfully except.

The Court: The jury is not permitted to guess.

Mr. Rosenthal: May I respectfully except.

The Court: You go by evidence, not by guesswork. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.

Mr. Rosenthal: I don't want to enter into any discussion with your Honor, excepting that I have a different view and it is too late and I don't want to enter into a discussion as to the fact. I merely except.

The Court: That would be sloppy police work, to permit discussion" (R.pp. 3955-6).

The Court, by its ruling therewith, erroneously invaded the province of the jury, and further aggravated the error by its comments in respect to the reasons for denying the request to charge. Here the Court refrained from permitting the jury to pass upon the question because, as it claimed, "it is all guess work," but under almost similar circumstances when it came to the life of the defendant, the Court was content to leave it to the jury.

SUMMARY OF BERNSTEIN'S TESTIMONY

To enumerate all the faults, admitted perjuries, inconsistencies and discrepancies in Bernstein's testimony would be impractical in the ordinary limits of a brief. We believe so much thereof as will be necessary to conclusively establish to this Court that he admitted committing perjury in the Cohen trial in the Mountains (which was also a capital case) and in this trial, to such an extent that even the Court was moved to label him as having "lied" before the jury, has been set forth in the preceding subdivisions. All his changes of testimony were for the patent purpose of implicating the defendants on trial at whatever cost. Truth played no part in his discourse. A mere cursory comparison between his testimony at the trial and before the grand jury will conclusively demonstrate the conscious consistent effort on his part to substitute the names of Capone as well as Weiss for Strauss, who had already been executed.

In view of all that has already been pointed out as to Bernstein's credibility, it would be gilding the lily to add

thereto, since the contents of these letters will clearly demonstrate that Bernstein still is the vicious character he was before he gave himself up and assumed a mantle of reform and truthfulness.

In conclusion, the following quotations taken from the record will clearly demonstrate that he testified untruthfully, knowing it was wrong, in the Mountains where a man's life was also at stake and that he deliberately lied on this trial where Capone's life is at stake; and despite his protestations of telling the truth before the grand jury, the testimony given on this trial is irreconcilable to that given before that body. We quote:

> "By the Court: Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong.
>
> Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong" (R.pp. 797-8).
>
> • • • •
>
> "Q. You say you are telling the truth on this trial? A. All of the truth, and I told the Grand Jury the truth too" (R.p. 877).

Told grand jury truth about everything before he was a witness.

> "Q. Did you or didn't you? A. I told the grand jury the truth about everything in this case long before I was a witness." (R.p. 797)

> "By the Court: The rest of the letter must be submitted before the Court can pass on it. He has admitted now that he lied. You do not have to establish that." (R.p. 1249)

> "• • • It is established that the witness testified under previous cross that he did not send out a letter and now he admits that he did.

Mr. Talley: Your Honor has stated from the bench that this witness has testified falsely with regard to sending the letters.

The Court: Yes.

Mr. Talley: Your Honor stated—I think the language was that he had lied before this jury.

The Court: Yes, that is obvious." (R.p. 1261)

The only other testimony against Capone was that of Magoon. His testimony on the trial has been amply quoted in the petition.

We feel that this evidence against Capone was insufficient as a matter of law for submission to the jury and the indictment should have been dismissed.

Though mindful of the fact that this court is loathe to inquire into or overrule a determination of fact by the highest court of a sovereign state, a short discussion of the proof against petitioner is, nevertheless, herein set forth to demonstrate how substantially the unfair trial petitioner received erroneously influenced his conviction.

The New York State Constitution, Article VI, §7, so far as applicable, provides:

> "The jurisdiction of the Court of Appeals, except where the judgment is of death, • • • shall be limited to the review of questions of law;"

In construing the authority vested in it under this section, the Court of Appeals held:

> "'This,' said the court in *People* v. *Gaffey* (182 N. Y. 257, 259), 'enables us to review the facts in capital cases as we always did.' A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a

> reasonable doubt. We are obliged to weigh the evidence and form a conclusion as to the facts. It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt." (*People* v. *Crum*, 272 N. Y. 348, at 350)

Even though the Court of Appeals of the State of New York apparently affirmed the judgment of conviction, it was only an affirmance in form, rather than in substance. Though the Chief Judge cast a deciding vote for affirmance, his opinion, even on the facts, is a brief for reversal. He stated, "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind." In fact, his opinion appears to be for reversal, until almost the end thereof when he votes for affirmance despite the admitted lack of proof beyond a reasonable doubt, despite the recognized serious errors of law and despite the acknowledged unfair tactics of the district attorney. For that reason, the following discussion of the facts is set forth.

Despite the voluminous record—the testimony of thirty-six witnesses and the introduction of fifty-seven exhibits (none of which exhibits directly affected Capone)—tersely summarized, the People's proof against Capone consisted of the testimony of the self-confessed accomplice Bernstein, whose testimony has been set forth briefly in the petition annexed hereto, and the criminal Magoon, who furnished the alleged corroboration consisting of a supposed conversation had with the petitioner approximately three years after the occurrence, and whose testimony has also been set forth in the petition.

To characterize the testimony of either Bernstein (who did not hesitate to testify falsely in both this trial and in another capital case—'knowing he was doing wrong') or the "little white" liar Magoon, would be superfluous after a reading of the matters regarding them, hereinbefore set forth. Suffice it to say that both are equally unworthy of belief. But in order to sustain the conviction, it would be necessary to label both these witnesses, contrary to conscience and human experience, as truthful*; for if either witness is not entitled to any credence, the other witness must perforce fall and the conviction fail. If Bernstein is disbelieved—and, indeed, it is impossible to understand how any other conclusion can be reached—the conviction cannot be sustained even if Magoon's testimony be believed; for Magoon's testimony, in that event, would not be sufficient in itself to warrant a conviction. And conversely, if Magoon is disbelieved, the conviction must also fall even if Bernstein is believed: for then Bernstein's testimony would lack the necessary corroboration. Under these circumstances, the trial court should have dismissed the indictment against Capone on his motion, on the grounds herein set forth, first made at the end of the People's case and renewed after the defendants had rested (R.pp. 2714-5; 3538-40). By submitting the question of his innocence or guilt to the jury, the trial court, in effect, held that both Bernstein and Magoon could be believed. This was contrary to the credible evidence and erroneous as a matter of law.

But even if we assume, arguendo, that both Bernstein and Magoon are to be believed, still there was insufficient evidence for submission to the jury. Bernstein was an

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* Although this argument is advanced, we do not concede Magoon's testimony, in any event, furnished the necessary corroboration.

accomplice as a matter of law, and the trial court so charged (R.p. 3888). Therefore, his testimony required corroboration (*Code of Criminal Procedure of the State of New York, Sec. 399*). Magoon's alleged conversation, it is contended, does not furnish the legal corroboration required, does not constitute an admission nor does it sufficiently tend to connect Capone with the commission of the crime.

To hold that this alleged conversation by Capone constituted corroboration, it would be necessary irresistibly to conclude that the words "on the" meant "implication in" and that "Rosen thing" meant "Rosen murder." In making this determination, however, one is struck by the utter inconceivability of Capone making such an assertion. The only witness who connected Capone with the crime was Bernstein, and according to him, the only time Capone was on Sutter Avenue was on the day before, in a moving closed car which, with all other traffic, passed by Rosen's store. If this be true, there certainly was not any danger of being recognized and connected with a murder which took place on the following day. How ridiculous, therefore, to conclude that Capone meant that he was implicated in the Rosen murder when he told Magoon that he was "on the Rosen thing" and was not recognized. Even assuming he made this oral statement, it certainly did not mean the murder, or being implicated in it, for the people's proof discloses that he was never on Sutter Avenue under circumstances to fear recognition. This is further borne out in the summation of the prosecutor who also conceded that Capone did not hang out around Sutter Avenue and that there was not much of a chance of his being "made." We quote in part from the summation:

> "• • • Why let me show you how cunning was this Capone in this Rosen case, as disclosed by the

evidence. His lawyer said he did not hang around Sutter Avenue. You can bet your bottom dollar he did not. When he drove around there, it was not in his car—it was in Bernstein's car (R.p. 3831).

• • • •

Did he leave any opening other than being with Bernstein on Sutter Avenue? So what? If Capone had been seen riding on Sutter Avenue with Bernstein—so what? (R.p. 3831).

• • • •

• • • But he admitted, 'I worked on the Rosen thing, and I was not made.' He was not the man because when he went by on Sutter Avenue it was in Bernstein's car—there wasn't much of a chance of picking him, or his being made. It is true he was not 'made,' and there was not much of a chance—he did not leave much room. The slip-up Capone made was in trying to do Lepke a favor a second time, to kill Rubin, • • •." (R.pp. 3853-4)

All the salient factors necessary to constitute an admission are absent from the instant case.

In conclusion it is respectfully urged that in view of the discussion from every possible angle of the evidence against Capone, there is no conceivable theory under which the learned trial court would have been justified in submitting this case to the jury. The conclusion that the court was in error in so doing, becomes all the more fortified when we consider in what light the court regarded Magoon's supposed corroborative evidence. We illustrate:

When first asked as to whether it was the intention of the court to permit the jury to speculate on what the word "thing" meant as related to Rosen, the Court stated,

> "I have thought carefully on that point. In fact, I have thought a bit while lying awake nights during this trial" (R.p. 3540).

While charging the jury, the Court spoke of paucity of the corroboration. We quote:

> "Now as to Capone—and please pay strict attention, gentlemen, on this point; it is quite important. In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone." (R.p. 3918).

Requested to charge on the weight of the testimony of Magoon and Bernstein in so far as it affected Capone, the Court confessed being "a little puzzled" about the language of Magoon and labeled it as being "too indefinite." We quote:

> "• • • I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, 'What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made.' I think that is too indefinite." (R.p. 3962)

These expressions lead the writer to believe that the Court was of the opinion the case could be submitted to the jury on Magoon's testimony concerning the witness Rubin. This, of course, would be clearly erroneous, for nothing in that testimony tended to connect Capone with the crime charged in the indictment.

As to the Rubin episode, after reviewing all the People's evidence and instructing the jury as to which parts thereof would be applicable to the individual defendants, the court charged specifically, in reference to Capone, what

evidence may be used as corroboration of the accomplice Bernstein, as follows:

> "Now, what is it? It comes down to Magoon. It depends on whether or not you believe that Magoon told the truth when he gave the testimony which I shall now refer to. If you believe he told the truth and you accept it as evidence tending to connect Capone with the commission of the crime, then it will be sufficiently corroborative, according to your finding, and you will then, if you accept the testimony of the accomplice witnesses in the light of this alleged corroboration, apply it against Capone." (R.pp. 3919-20).

The Court then reviewed two items of Magoon's testimony involving Capone. One was the "tailing" of Rubin wherein Capone is alleged to have stated on one occasion when Magoon reported his progress, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him." (This occurred in the fall of 1938, two years after the crime.) And the other was the conversation in which Capone is alleged to have said, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made" (R.p. 3920). As to those two items, the Court said:

> "Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration" (R. p. 3920).

The Court then emphasized Magoon's testimony relative to tailing Rubin (the first item submitted by the court as corroboration), because of the "great importance of this feature of the case," by reading all the direct testimony on the subject (R.pp. 3921-2). After reading same, the Court further charged:

"Gentlemen, I think that is the text applicable thereto, unless there was something on cross examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses. (The court meant two items.)

If you believe that testimony, and it is for you to say whether you believe it or not, then you may ask yourselves is it sufficient as tending to corroborate Berger and Bernstein. If it is, you may convict. If you do not believe it, or, believing it, you don't deem it sufficient as tending to connect, you will have to acquit Capone, because if Capone was in a huddle there and was a conspirator in the proposed trailing or tailing of Rubin for the purpose of another attempt at assassination, then that may be used as evidence of guilt on the part of Capone" (R.p. 3926).

An exception was taken to the instruction permitting the jury to consider this Rubin episode as against Capone (R.pp. 3985, 3986-7).

In conclusion, as to the probative force of Magoon's entire story, Judge Loughran of the New York Court of Appeals, aptly stated:

"(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: 'I worked on the Rosen thing and it was right on Sutter Avenue and I was not made.' In the declared opinion of the trial judge, the statement so

reported by Magoon was 'too indefinite' to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the murder of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of this court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. See *People* v. *Crum*, 272 N. Y. 348. On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. (*Law* v. *Merrills*, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, (3rd ed.) § 2094, p. 468). Magoon was not a reputable witness. He is a self confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision of Bernstein of his original evidence against Capone. For the purpose of this opinion only, we shall assume that the finding of Capone's guilt is not against the weight of the evidence; but we stress this phase of the record as a strong contradiction of any assertion of the conclusive quality of the proof for the People" (R.pp. 4082-4083).

II.

THE CASE WAS NOT TRIED BEFORE AN IMPARTIAL JURY. THE COURT ERRONEOUSLY SUSTAINED CHALLENGES FOR CAUSE MADE BY THE PEOPLE AND ERRONEOUSLY OVERRULED CHALLENGES FOR CAUSE MADE BY THE DEFENDANTS. THE DEFENSE WAS PREJUDICED BY THE COMPULSORY ACCEPTANCE OF THE LAST THREE JURORS, AFTER THEIR PEREMPTORY CHALLENGES EXHAUSTED. THE DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTIONS 2 AND 6 OF NEW YORK STATE CONSTITUTION.

The questions involved in this point are based on the *voir dire* which does not appear in the printed case on appeal. An application that it be so included was made to the Chief Judge of the Court of Appeals, who, however, directed that instead of printing the same a typewritten copy was to be filed and delivered to defense counsel for the purpose of bringing it up for review. This copy consists of 2783 typewritten pages, and was only furnished to defense counsel shortly prior to the argument of the appeal in the Court of Appeals. No opportunity was afforded to defense counsel to move to correct the many deletions and inaccuracies which were encountered in preparing this argument. Reference will, therefore, be made in this point, where necessary, to the alleged deletions and inaccuracies in the record.

At the commencement of the trial the panel consisted of 250 talesmen. It was found necessary to draw a panel of an additional 100 talesmen, which panel was practically exhausted by the time a jury was finally selected. A vast number of these talesmen were excused because of prejudice against the defendants. Many of the peremptory

challenges exercised by the defense were because those talesmen, after evidencing a knowledge of the case, contended that they had formed no opinion—which did not justify a challenge for cause. (See voir dire of talesmen William C. Pape, Emanuel Camachi, Thomas G. Jones, Thomas E. Finn, Carl A. Ryder, Frank X. Butler, Thomas W. Madigan, Frederick G. Harris, Wilfred Pagnod, Roland M. Robert and Steward Andrews.) All these talesmen read news items about the case or a series of articles dealing particularly with these defendants, which appeared in the New York Mirror (122-3; 44-9; 1441; 1943-4; 2209-2213; 2254; 2246; 2405; 2590).* This reading matter caused the forming of an impression—but it did not amount to an opinion (132-3 450-1).

The defense exhausted all thirty peremptory challenges to which it was entitled. Ten of these were exercised when challenges for cause were overruled. After the exhaustion of the thirty peremptory challenges by the defense, three jurors were seated. As to those, either a challenge for cause was overruled and an exception taken, or the defense rested on the record.

The prosecution used eighteen peremptory challenges. Of the challenges for cause by the prosecution, it is contended herein that six of them were improperly sustained, to the prejudice of the defendants.

The process of selecting a jury began at a slow pace. Most of the talesmen said that they were prejudiced and could not sit impartially in the hearing of the case. The Judge said that the "Mirror" articles, particularly, were "*raising havoc with the jury*" (614). And though the court had admonished the talesmen not to read the articles in the Daily Mirror, a copy of that newspaper was found,

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* All references to voir dire are to pages in the typewritten transcript

as pointed out to the court by one of counsel, "on the very front seat of the court room, where jurors were assigned to sit" (s.m.p. 448-9). A good deal of time was lost because of recesses for religious holidays, Primary Day, afternoons devoted to other judicial work, and at least two adjournments to permit counsel to recover from colds. Suddenly, the Court apparently became aware that the leisurely pace of selecting a jury was the subject of newspaper comment. The tempo changed. When talesmen asserted that they could not sit impartially because they were prejudiced against defendants, the Judge said to the defense that the mere fact of asking about the talesmen's prejudices "is clearly establishing an escape medium for the juror if he does not want to serve. You are putting the words in his mouth. • • • You are doing the thinking for the talesmen" (Fitzgerald, 335-6; also, see Kendy 430). A talesman who asserted his inability to be fair was charged with "unwillingness to serve." Another heard himself thus described by the Judge: "I don't think this man is mentally fitted to sit on a jury" (Cone, 439). This same characterization was also applied to still another talesman who was ordered by the Court to "get out" (Herrick, 542). Defense counsel remonstrated that these remarks were calculated to *intimidate talesmen* and prevent a free revelation of their prejudices (Herrick, 543), but similar judicial comment was repeated in the presence of the panel. Talesmen who said that they would be embarrassed to serve because of friendship with the prosecution or defense counsel, were berated as "wholly unfit to have a job as a juror," and as being hostile "to the Court's questions" (Rosenthal, 726-7). When a talesman was peremptorily challenged by the prosecution, the Judge read into the record some prepared remarks on the abuse of the exercise of peremptory challenges (Cleary,

1295-6; also, Kendy, 426), and his comments were so worded as to apparently furnish the basis for a newspaper story, which sounded as though he was criticizing the defense for deliberately delaying the process of selection, and was so reported.

The errors committed in the selection of the jury, which will be discussed herein, will be subdivided as follows:

A—Erroneous overruling of defense challenges for cause;

B—Erroneous sustaining of prosecution's challenges for cause; and

C—Seating of jurors who were challenged for cause after defense exhausted thirty peremptory challenges.

A

1—JOHN R. HAMILTON (201-239)

He was an accountant employed by the National Carloading Corporation (202). When asked by the prosecutor: "Do you sit in the jury box free from prejudice?" his answer was: "As far as I can tell, yes, sir." (210). Later, when questioned by one of the defense counsel, he stated he had read an article concerning one of the defendants in the "Daily Mirror," about the same time that he had been called as a juror, approximately a month ago (212-213). We quote from his examination:

> "Q. Without mentioning his name, did it prejudice you against that particular defendant? A. *I don't think so.*
>
> Q. You say you don't think so. I take it that implies some doubt in your mind. Am I correct? A. *It is hard to dissociate the impression.*
>
> • • • • •

Q. And the impression, I take it was an unfavorable one to that defendant, isn't that so? A. It would be, yes, the way the article was written.

• • • •

Q. And that impression still remains with you? A. Yes, sir.

Q. And that is an impression that is prejudicial to that particular defendant? A. Yes, sir.

Q. And if you were sworn as a juror, it would need some proof or evidence to dissipate that impression is that so? A. I am afraid so." (214)

He then stated in substance that the article seemed to be the truth, to the prejudice of the defendant, and he has not completely eliminated that prejudice (213).

"Q. Do you feel that in deliberating, in pondering over the guilt or innocence of the defendants on trial in the Rosen case, that you could banish any impression that you received from the one reading of that newspaper? A. I think I could." (218)

• • • •

"Q. If you took an oath to be a fair and impartial juror, ready to render a verdict without sympathy or prejudice, and you felt the way you feel now, you would be violating that oath, would you not? A. I don't think so." (221)

He believed that he could discount the prejudice if the defendant took the stand, but it would require an effort on his part. He was then questioned by the Court as to whether he could set the prejudice aside:

"Q. Would you be able to do that? A. I believe so.

Q. Can you give us your promise that you would? A. Yes, sir, I would make every effort." (224)

Ever since he read the article in "The Mirror," the prejudice has remained with him (225) and it caused an impression in his mind, so that he accepted the truth of the facts stated therein without any substantiation on anybody's part (228-9).

> "Q. So that if the trial lasts about four or five or six weeks, you will still reserve that impression until such time; is that so? A. Yes.
>
> Q. And you will be sitting in that box, in that jury box and all the time you will hear this testimony and somewheres in the back of your head will be that impression, waiting for you to either use it or not use it; is that so? A. Yes." (232)

The talesman was then challenged for cause, and the challenge was overruled, and an exception taken (232-3). He was questioned by another counsel for defense:

> "• • • In the ordinary case, if you knew nothing about the individuals or the case, there would not be any question but what you could sit as a fair and impartial juryman without any prejudice against the individual on trial is that right? A. That is right.
>
> Q. But in this particular case, you have a prejudice created by what you read and what you believed when you read it as to the character of one of the men; is that right? A. That is right" (236)

He admitted having answered Mr. Barshay (one of defense counsel) that he had reserved his prejudice or impression until the question of character came in issue and meant by that that if some people came to the stand as witnesses for The People and made detrimental statements as to the defendant's character, that would lend greater weight to his bad character because of what he had read in "The Mirror" (237).

"Q. In other words, because of what you read in 'The Mirror' as to his character, if anybody got on the stand as The People's witness and accused him or said things detrimental to his character, it would have a greater weight because of what you have read? Is that what you just said? A. Purely in that one line." (237)

He was again challenged, and reiterated under oath that if the question were repeated, his answer would be the same (238).

He was then questioned by the Court:

"Q. Are you willing, in that event, in this case, if sworn as a juror, to completely set aside any impression you may have from what you have read? A. On character alone?

Q. On character alone? A. Yes, sir.

Q. Are you sure that you can? A. Yes, sir, I am sure." (239)

The Juror was again challenged for cause. The challenge was erroneously overruled, an exception taken, and the defense was compelled to challenge peremptorily (239).

We call attention to the different standard utilized by the Court in determining the qualifications of at least two other prospective jurymen, one of whom was challenged by the defense, and the challenge sustained, and the other, by the prosecution, and the challenge sustained.

In the case of *Woolsey W. Conlin* (67-108), he stated that he had formed an impression from reading newspapers which would be difficult to remove though he would try. He further stated, however, that he would not require a greater amount of evidence on the part of the de-

fendants to be produced than otherwise would be necessary in order to establish their innocence, or a lesser amount of credible evidence on the part of the People in order to establish their guilt (107). However, on further questioning, he stated that he was quite sure that he could dismiss what he read from his mind. But asked whether that implied that he had a doubt, he said, "Yes, sir" (107). The prosecutor then attempted to establish he could lay aside his impression and decide the guilt or innocence of the defendants on the evidence he heard in the courtroom and on the Judge's charge of the law, but the Court held that if the answer to the question is "Yes," it would contradict his other answers, and sustained the challenge.

In the case of the instant talesman, however, the juror had evidenced a prejudice which he only *believed* he could remove, and that the prejudice remained with him and would remain during the entire time that the trial continued. But after he had been challenged on two occasions, the Court asked him whether he would be willing to set aside the impression, (although in the Conlin instance he refused to permit the prosecutor to ask a similar question) and upon procuring an affirmative answer, overruled the challenge made by defense.

In the case of *Samuel Silfen* (1557-1565), the prosecutor challenged the prospective juryman because he stated that the name of Buchalter is familiar as that of a dentist, *whom he does not know personally*, but who his mother-in-law used as such (1559). This dentist never visited the home of his mother-in-law, and the relationship was solely that of dentist and patient. He then stated that he had a slight impression as to the guilt or innocence of the defendant from matters which he had read in the press, which would require evidence to remove, and was there-

upon challenged by the prosecutor (1560-1). However, when questioned by defense counsel, he stated that if the Court were to charge various questions of law, he would accept the same from the Court, and was willing to undertake to lay aside the slight impression he had and make every effort to dismiss it from his mind (1564). The Court, nevertheless, sustained the challenge made by the prosecution (1565).

2—SAMUEL F. STRONGIN (894-928)

He was employed as an audit clerk for the Metropolitan Tobacco Company, and lived in Brownsville, the section in which the murder was committed, four out of the last five years, at Grafton Street near Livonia Avenue (895), about two blocks from Rose Gold's place (897), which was situated at Saratoga and Livonia Avenues (896).* He was familiar with this corner, knew the name of the proprietor, and patronized the store (896-7). He had known and heard various things about the persons who hung out or congregated at that corner and has seen and heard various things which made an impression upon him (896).

> "Q. And you have heard in that area the mention of various names that you have heard mentioned by the lawyers in the case? Having lived in Brownsville for four out of the last five years, you have some impression about this case, haven't you? A. Persons, yes." (896)

At the time Rosen was murdered, it was a topic that concerned the neighborhood and he supposes he did dis-

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* This is the store and corner alleged to be the hangout for the so-called combination

cuss the subject with people, friends of his, and so on (897). At the time of the commission of the deed, there was a big write-up and it was the subject of discussion in places that he visited, and he was inclined to accept the truth and accuracy about what he read and heard at face value, and probably formed some conclusion with respect to them, but feels, however, that he could lay aside any impression which he had (907-8).

> "Q. Would you require a lesser amount of proof from the District Attorney by virtue of what you heard or read? A. That may be true.
>
> Q. So that, can we go one step further and say you may want some explanation forthcoming from the defendant? A. I believe so.
>
> Q. You have already heard, sir, up to this very minute many times repeated that a defendant need not come forth with any explanation of any charge against him? A. Yes, I know that.
>
> Q. You had that in mind when you answered my question? A. Yes." (909)

He explained that what he meant by his previous answer was that the defendant need not necessarily provide the reason, but that *somebody on their behalf* should. He admitted being clear on the subject that the defendant might remain silent and no unfavorable inference could be drawn against him therefore (909-910). He reiterated:

> "Q. You still expect that something should be forthcoming from someone on behalf of the defendant in explanation of the charge; isn't that so? A. I answered that before.
>
> Q. What? A. I say I did answer that before.
>
> Q. And you still are of that opinion, isn't that so, sir? A. Yes." (910)

He protested, however, that he could enter the trial with an open mind, and first claimed that he had been led into making the previous answers, although he subsequently admitted, knowing from his presence in the court and having listened to preceding jurors being questioned, that he was not led into the answers by defense counsel (910).

> "Q. Knowing that, sir, without being led into it, yet you said you would require someone to offer some testimony. Didn't you say that? A. I did. Q. That is not fair, is it? A. I am aware of the conflict. I realize that, but I still stick to my previous answer." (911)

He further admitted that he passed Rose Gold's store practically every night, his company sold them tobacco and other products, and he had a definite opinion of the character of the people who hung around the corner, and if their names became a part and parcel of the case, he would have a prejudice against them which would apply either to persons in the prosecution or defense (912-13). The Court then inquired:

> "Q. Reles and Strauss?* A. That's right." (913)

Then questioned by another of defense counsel, he admitted that he knew the individuals whose names had been mentioned by the prosecution and defense counsel and had formed an opinion as to the character of these particular individuals, and that opinion may have amounted to a prejudice against these individuals (922).

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* It must be remembered that Strauss was a co-defendant in the case at bar.

"Now, isn't it a fact, candidly, Mr. Strongin, that because of your knowledge, first hand knowledge, of the particular location and of some of the people or things that may transpire in this trial, either the amount of the evidence which the prosecution would have to adduce is less or more, or the amount which the defendants would have to produce is less or more than what it would be if you did not know any of the individuals, any of the surroundings, any of the locality? Isn't that true, sir? A. True to a certain extent. Q. Yes, the fact is that you would permit, subconsciously or otherwise, in the juryroom, your knowledge, gleaned from a knowledge of the neighborhood and some of the individuals, to creep into your deliberations, as honest as you are. A. Consciously I would not. Q. But there is that possibility of your mind being in that situation? That is why you said you had a prejudice, isn't it? A. That is true." (923).

The talesman was then challenged for cause and admitted under oath that if the questions were repeated, his answers would be the same, but in answer to the prosecution stated that he could try the case on the evidence, free from any impression or opinion and on the testimony adduced on the trial (923-5).

The challenge was thereupon overruled, and an exception taken (925). Whereupon, defense counsel sought to question the talesman further in view of the answer given to the prosecutor, but the court proclaimed that the challenge had been fully tried and refused to permit further examination, and an exception was taken (926). The talesman was then asked whether he had not stated in answer to Mr. Barshay's question that the amount of evidence that would have to be produced in this case, either by the People or the defendant, would be different

because of his knowledge of the individuals and whether he was not fully cognizant of his answer when he made it, and he stated, "Yes," and he meant it when he made that answer (926-7).

The talesman was again challenged (927), and the Court overruled it, with the following statement:

> "* * * The Court understood the talesman. His prejudice, so-called, relates as he stated in the course of his questioning to a proposed witness for the People, but does not activate against the defense. The challenge is overruled." (927-8)

An exception was taken, and the juror peremptorily challenged by the defense (928).

The overruling of this challenge constitutes one of the most glaring examples of error committed by the Court throughout the entire selection of the jury. This prospective juryman was not only acquainted with Brownsville, but patronized the store at the corner frequented by the so-called combination, read a big write-up about the crime in question, discussed it, accepted as the truth what he had heard, formed a conclusion that would require evidence on behalf of the defendant to dissipate, and even was acquainted and prejudiced against the deceased defendant Strauss, and admitted that it would require a lesser amount of proof from the District Attorney by virtue of what he had heard or read. Merely because he stated in conclusion, in answer to the prosecution's question, that he could try the case on the evidence free from any impression or opinion (924-5), the challenge was overruled. The Court erroneously refused to permit defense counsel to question the talesman further in view of the contradictory answer given to the prosecutor, but proclaimed that the challenge had been fully tried, to which exception was taken.

Compare the ruling above to the ruling of the Court in respect to the talesman Nathan Jellin (783-825), who was challenged by the prosecutor for cause on implied bias because he stated that conditions in Brownsville, in reference to certain persons who hung around the corners, were terrible (823), to which challenge counsel for the defense consented (824). Here the Court insisted on the challenge being tried (824), and although the talesman was merely asked thereafter as to whether his responses would be the same, to which he answered "Yes," the court immediately sustained the challenge (825).

In another instance, upon the examination of talesman Benjamin Bergman, Jr. (2049-58), the prosecutor challenged for implied bias, "because of his knowledge of the conditions on the corner there" (2058), notwithstanding the fact that he had absolutely no prejudice against the defendants (2055); that even though he knew the particular corner and had patronized it as a customer on occasions, it would not affect his ability to pass on the evidence in the case nor would he be embarrassed by jury service (2057). Having in mind that in the instant case of Strongin he had stated that he not only knew Reles and Strauss, but had a distinct prejudice against Strauss, we quote the following from Bergman's questioning:

> "Q. As you sit in the jury box now have you any impression about Harry (Pittsburgh Phil) Strauss?
> • • •
> A. I have.
> Q. Is it one that is derogatory to him? A. It is.
> Q. That name will figure in the testimony—I just tell you that as a thought—that is about as far as I can go. Have you some idea about Abe Reles?
> • • •
> A. I have not." (2057)

In spite of the ability of the talesman to be fair, the Court erroneously sustained the challenge, saving the exercise of a peremptory challenge by the People.

3—JAMES F. NAGLE (1122-1171)

He resides at 80 Willow Street and is employed as a salesman by Timm & Behrens, a real estate firm (1122-3). In reply to prosecutor's questions, he testified as follows:

> "Q. If you are charged, as you undoubtedly will be by the Court, that even if you believe an accomplices' testimony, if you believe every word he says, that the defendant's participated in the murder, • • • and you believe everything he says, if there was no other supporting evidence, the law is that you would have to acquit; would you follow the Judge's instructions?
>
> The Court: Without corroboration?
>
> Q. If there was no corroboration? A. If I was convinced they were guilty, I would do it very reluctantly." (1126-7)

He then stated he would follow the Judge's instructions of law if the Judge charged that in addition to the testimony of accomplices there must be, before there can be a conviction, other evidence tending to connect the defendants with the commission of the crime. However, when questioned by defense counsel, he testified as follows:

> "Q. Did I also understand you correctly, in respect to a question that was asked by Mr. Turkus, of you, that even if you believed an accomplice's testimony to be a hundred per cent true, that in accordance with our law, it would be encumbent upon you to acquit the defendant, that your reply to that question was that you would under those

> circumstances do so, with great reluctance? A No, that I would accept the ruling of the Court with reluctance." **(1133).**

When asked whether he had formed any impression about the case, "from any source whatever," he replied, "Possibly from scanning the headlines, I have had an impression," which impression was detrimental to the defendant, but which he *thought* he would be able to discard during the general course of the trial (1130-31). However, when questioned by another defense counsel, he stated that through some contacts he had in East New York, a section adjacent to Brownsville, he heard discussions concerning crime in that locality; and that those discussions, coupled with what he read, caused an impression adverse to the defendants (1133, 1137). He protested, however, that the impression did not go towards the guilt or innocence of the defendants and was not such as would remain in his mind and activate him in determining that question; there was no doubt in his mind as to his ability to remove that impression (1139-41). He then testified as follows:

> "Q. Mr. Nagle, something would be required in the course of the trial to change the impression? A. Only the ordinary course of the trial.
>
> Q. What in the ordinary course of the trial, do you think would happen, would you require in order that that impression might be removed? A. Only the general testimony given; that is all.
>
> Q. Then it would require some testimony, whether it was general or specific, to remove the impression? A. Possibly.
>
> Q. Not 'possibly.' Actually, is not that the situation? A. No, I think I could cast it aside if I was accepted in the box." (1142)

Finally, to reach a determination after the contradictory replies of the talesman, the following occurred:

> "Q. Mr. Nagle, let us be perfectly fair with each other. I am trying to be fair with you. There have been so many questions asked upon this subject, I am a bit confused as to just what your state of mind is. I will put the question plainly to you: Have you or have you not an impression as to the guilt or innocence of these defendants at this moment? A. I have a slight impression.
>
> Q. And that impression is detrimental to the defendants or some of them? A. Yes." (1143-4).

This impression, he stated, would have to be dissipated during the trial, only after someone gave him testimony as a basis for laying it aside (1152, 1154). He would not expect the District Attorney to furnish such evidence.

Though he protested that he knew of no reason why he could not sit as a fair and impartial juror on the trial of the case (1149), he, nevertheless, testified as follows:

> "Q. Should the Court so charge you, will you follow the instructions of the Court and draw no inference of guilt against the defendant for his failure to take the stand? A. I would, sir, very reluctantly." (1148)

He stated he did not agree with such instruction (1148) and that his reluctance to accept the Court's charge was not based upon the impression he had of the connection of one of the defendants (1149). At that point, he volunteered: "No, my reluctance would be more or less, that a person accused of a crime should be willing to get up and——" The Court then interrupted the talesman and refused to permit him to continue (1149), to which an exception was taken (1150).

He was then challenged for cause and stated under oath that he still retained an impression unfavorable to one of the defendants in the case (1160). He then stated to the prosecutor that he could and would lay aside this impression (1165-6). However, when defense counsel sought to ascertain whether that impression would only be laid aside if and when evidence is produced by a defendant to cause it to be laid aside, an objection by the District Attorney was sustained to which an exception was taken (1166). The challenge was then erroneously overruled, to which an exception was taken, and the talesman was peremptorily challenged by the defense (1170).

The erroneous refusal to sustain this challenge for cause is comparable to the analysis given in respect to the talesman John R. Hamilton. (See pp. 66-69 of this brief).

The discussion as to the erroneous refusal to permit further questioning of the prospective talesman after the court and prosecutor had presumably succeeded in rehabilitating him will be discussed in the analysis at the conclusion of this point.

4—EDWARD GRODEN (1171-1220)

He was auditor of the First National Bank (1171). He had heard District Attorney O'Dwyer speak at meetings many times; knew Assistant District Attorney Rooney very well, and worked for Judge O'Dwyer and was a booster of his (1182). *He believes in causes sponsored by O'Dwyer and is positive that O'Dwyer's office would not bring about an indictment unless they felt sure* (1182-3). He would not say that he is free from bias or prejudice against the defendants, but it is not based upon the particular case but on the general set-up as a whole (1183). He read some of the articles in "The Mirror" about these

defendants and had formed an opinion of the defendants which is detrimental to them (1184-5), and although he was biased and prejudiced, it would not take less evidence to convince him of the guilt of the defendants (1185).

He had discussed criminals with Assistant District Attorney Paul Lockwood many times, and as a result of his association with Lockwood, had a bias against people charged with crime, and in this case, had a prejudice against one of the defendants who had been convicted of crime and is incarcerated for a long time (1187), insisting, however, that the prejudice could be laid aside and that his faith in Judge O'Dwyer would not influence him (1188-9).

From reading the "Mirror" articles, he formed an absolutely unfavorable impression of defendants but it would not take some evidence to remove that impression. Asked what would remove it from his mind, he replied, "I don't think anything would remove it" (1207).

He was then challenged for cause. The challenge was erroneously overruled on the ground that "he has not said it would affect his judgment in this case" (1208). An exception was taken, and the talesman was peremptorily challenged (1220).

Compare the ruling in the instant case with that of Morris Leibowitz (345-377; 409-410) who had merely met District Attorney O'Dwyer as a member of some political club, but would not be prejudiced because of that fact. After a thorough questioning, he was tentatively seated in the box as prospective juryman No. 1 (377). On the next court day, however, the following discussion about the fitness of this juryman took place:

> "Mr. Turkus: I had a discussion with Judge O'Dwyer as regards this talesman (Leibowitz); he

is to be of assistance to him in the campaign and it might have some implication on a verdict to be rendered in the case. Under the circumstances, I am going to challenge for cause.

The Court: Do counsel for the defense wish to try the challenge?

Mr. Talley: No, we do not.

The Court: It is unanimous?

Mr. Talley: Yes, all the defendants join in it.

The Court: Then there is nothing to try and the Court has to sustain the challenge. Of course, there has to be ground for it. I am of the opinion that notwithstanding the apparent absolute honesty of this talesman and the fact that he would be an excellent foreman for this jury, he would be in an embarrassing position in the jury room as foreman of the jury in expressing any opinion on this because of his political connection. Challenge sustained." (409-410)

Again, compare the instant talesman with Sidney J. Flamm (1470-74), who stated that he had been arranging some radio political talks for Judge O'Dwyer's representatives and felt, in answer to a leading question by the prosecutor, that because of that fact it would be more fitting and proper that he not be on the jury. Whereupon the prosecutor stated:

"I think so too. I don't want anybody in who would be embarrassed because of that kind of a connection.

The Court: You mean he is challenged?

Mr. Turkus: Yes.

The Court: Try the challenge." (1473)

Whereupon, the challenge was tried on the ground aforementioned. No questions were asked by defense counsel, and the court sustained the challenge (1474).

As to the instant talesman, further comparison should

be made with the talesman Sam Silfen, whose challenge for cause by the People was erroneously sustained. (See pp. 100-101 of this brief.)

5—PAUL F. BATTERSON (1251-1288)

He read about the case in the "World-Telegram" (1276), but did not gain any impression from reading the article. Asked whether he gained an impression against the defendants from any other source, he replied, "I have heard of the defendants before I was ever called for jury duty" (1276). The impression which was formed in his mind was unfavorable to the defendants and he still had it (1277).

> "Q. And would it require some measure of testimony to remove that impression from your mind, if accepted as a juror? A. I have an impression of the defendants, but I would not hold that against them were I put on the jury.
>
> Q. But you would enter the jury box with that impression in your mind, wouldn't you? A. I will probably always have the impression." (1277)

The impression which he gained he possibly heard from the radio's unfavorable comment concerning the defendants (1279). Asked whether with his unfavorable impression, should an issue be raised as to the truth or falsity of a statement made by one of the defendants under oath, could he lay it aside without allowing it to weigh on his mind in determining the issue, he replied, "I would set aside any impression that I have before judging the man's guilt or innocence" (1284-5).

The talesman was then challenged for implied bias, but the challenge was erroneously overruled, and an exception noted, and a peremptory challenge exercised (1287-8).

6—JOHN J. ROSE (1361-1393)

He resides at 246 East 32nd Street, Brooklyn, N. Y., and is employed as an electrical engineer by the New York and Queens Electric Light and Power Company (1361). In reply to the prosecutor, he stated that there was nothing which would prevent a fair verdict at his hands (1366).

When first questioned by one of the defense counsel, he stated that he read various news items and two or three articles about Judge O'Dwyer (1367). Asked whether they caused him to form an impression with reference to the case or the defendants, he replied "I had a very slight impression with regard perhaps to his character, but not with regard to the merits of the case," and that such impression was an unfavorable one (1367-68). He insisted that he could dissipate that impression as it did not have any bearing on the particular case (1368). The impression he had was that the defendants were members of Murder, Incorporated (1371). He then stated:

> "Q. Consequently you are prejudiced against them by reason thereof? A. Not prejudiced, no, sir.
>
> Q. Well, I will say an impression detrimental to them? A. Yes, sir." (1371)

He again insisted that this impression was "not regarding the case; only as to their character." Despite this, however, he stated that this wouldn't affect his judgment if the defendants should put their character in issue (1372). He then stated that having had that impression, he would take his seat in the jury box, if selected, with that impression still in his mind (1382). But, in answer to the Court, he replied that, as he stated before, he could lay aside and disregard that impression (1383).

He read articles in the New York Journal concerning the life of O'Dwyer. He read those articles after he was called for jury service in spite of the fact that the Court admonished the prospective jurors not to read anything about the case (1386, 88). The group he referred to was mentioned in the article (1387). He accepted what he read as true (1383).

He was then challenged by the defense for cause and under oath stated that the impression which he then had as he sat in the jury box, is one of detriment concerning the character of the defendants on the trial as members of the group he mentioned (1391-92). The challenge was overruled and an exception taken thereto, and the talesman was peremptorily challenged by the defense (1393).

Compare the Court's attitude as to the instant talesman with that assumed when talesman *Herman F. Bell* (1688-1706) was examined. This talesman admitted that he had read newspaper articles since he had been called for jury duty, but upon re-questioning by the prosecutor stated that the articles did not leave any impression in his mind as to the guilt or innocence of the defendants. However, the court ruled as follows:

> "The Court: The Court feels this way about it: According to my recollection, the instructions were given on August 4th—I believe that was the date. Apparently this man did not hear the instructions, but nevertheless, it was important that that instruction be observed in order to get an impartial jury. This was not a simple, casual reading of one article, or glancing at the headlines, but was done for the purpose of obtaining information, and it would not make a nice-looking record if this man were taken on the jury. The challenge is sustained." (1706)

It will be noted that an admonition had been given to the panel not to read any newspapers. The instant talesman admitted, however, having done so. He further admitted that he had an impression as to the defendants being members of Murder, Inc. Nevertheless, the challenge was overruled.

In addition, the challenge exercised in the instant case is comparable to the talesman *Hamilton*. (See pp. 66-69 of this brief.)

7—**JOSEPH J. FLANAGAN** (1895-1919; 1939-1942; 1960-3; 1970)

He was employed by the Public Service Electric Company (1896). He got a slight impression unfavorable to the defendant from newspapers which he has had all the time he has been in Court (1967). *It would require evidence of proper weight to remove this slight impression.*

He read articles in "The Mirror" which helped to form the impression. They were special articles related to the particular case (1907). He believes, if selected as a juror, that he would have to have evidence to remove that "unfavorable impression" and that is his honest impression (1908). He was thereupon challenged for cause by defense (1908) and stated that although he had been sitting in the courtroom listening to the remarks of all counsel with respect to the law and has heard the Judge instruct on a number of cases as to the law of our State, the true and correct condition of his present frame of mind is such that it goes to the guilt or innocence of the defendant due to the fact that he read articles regarding the guilt of the defendant and that is his honest state of mind (1909).

Questioned by the prosecutor, he stated that he is not anxious to get off the jury, but that was his opinion, although he could dispel the impression and have will power

enough to give a fair decision in the case; that whatever reading he did, is hazy in his mind (1911). He read some articles about the career of O'Dwyer which mentioned the defendant (1912), and he could dispel the impression which he had. However, when further asked whether he absolutely will dispel it, he replied, "I believe I have the will power" (1912).

After it was urged by defense counsel that the ability to dispel was based on belief and therefore the challenge for cause should be sustained, the talesman changed his answer so as to imply that he didn't think he would require any evidence to dispel the impression and he would not allow it to influence him (1912-14), and that when he had previously made the statement that the defendants would have to offer proof, he had lost sight of the fact that the defendants need never prove anything (1916).

> "Q. When you were next asked by Mr. Turkus, did you then say that you 'believed' that you could dispel the impression? A. I meant I thought I had the will power.
>
> Q. You 'thought' you had? A. Yes, sir.
>
> Q. That implied a doubt, didn't it? A. Well, I guess everybody has some doubt to some extent of their will power.
>
> Q. I just want to get your state of mind. That implied a doubt when you answered that question, isn't that true? A. It may have to a slight degree.
>
> Q. Then Mr. Cuff questioned you, you recall, and when he questioned you, you used the word again that you 'thought' you would be able to dispel, didn't you? A. Yes, sir.
>
> Q. That implied a doubt also, didn't it? A. I suppose so." (1916)

Further questioned by defense counsel, he admitted that when he used the word "thought," that implied a doubt and he further admitted that the impression went slightly

to the guilt or innocence of the defendants. Questioned by the Court, he stated that he did not *think* he would need evidence to remove this opinion (1917); he thought he had the will power to dispel it, which he supposed implied a doubt (1918).

> "Q. That was the state of your mind when you were first questioned by Mr. Turkus, when you were questioned by Mr. Cuff, when you were questioned by myself and when you were questioned by the Court? A. That is right." (1918)

He finally stated, in answer to the prosecutor, he has the will power to lay aside the impression that he had and will do so (1918). The challenge was then overruled and an exception taken by the defendants (1919). Prior to his final discharge as a juryman, the question was asked of him whether the quality of evidence that would be necessary for the District Attorney to produce would be less than would be ordinarily true were he sitting in a case where he did not have any impression against the defendant. An objection to this question was erroneously sustained and an exception taken (1960-63). (This question will be discussed in the analysis at the conclusion of this point.)

A peremptory challenge was exercised by the defendants (1970).

Compare with the analysis under talesman *Hamilton*. (See pp. 66-69 of this brief.)

8—WILLIAM J. KOEHLER (2131-6; 2162-7; 2169-71; 2188-93)

He is an insurance appraiser (2131) and knew something about the flour trucking industry, and was called as a juror in the Silverman case and was excused (2133).

He read about this case in the "Tribune" and "World-Telegram" (2162), but it was hard to say whether he formed an impression from what he read (2163). He had been called as a juryman in about seven capital cases. He has been on practically all of the Amen cases involving perjury (2199). He had come in contact with Max Silverman and Luckman, who had one end of a warehouse in which he had an office (2188). He knew Martin "Buggsy" Goldstein and thought "Mrs. Goldstein married people next door" to him (2191-2).

> "Q. By reason of this episode, have you in anywise followed with any interest the name of Martin (Buggsy) Goldstein? A. No.
>
> Q. Have you read about him in the paper? A. Who? Goldstein?
>
> Q. Yes. A. I knew that he was executed." (2192)

Upon this answer, the juryman was challenged for implied bias, and the challenge was erroneously overruled, an exception taken and a peremptory challenge exercised (2193).

The error in overruling this challenge was particularly prejudicial to the defendant Capone, for it subsequently appeared in the course of the trial, through the witness Rubin, that the prosecution intended to bring into the case the name of Martin "Buggsy" Goldstein as having been in company with the defendant Capone prior to the killing of Rosen.

9—CLEMENT S. JACOBUS (2482-4; 2485-6; 2487-96; 2508-22; 2523)

He is a real estate broker (2482) and has read and seen names in the "Tribune" and the "Sun," but does not

know anything about the case (2489-90). He has an impression which he formed that is unfavorable to the defendants, but could lay it aside (2491-91a). If accepted as a juryman, he will begin consideration of the case with an unfavorable impression in his mind about the defendants, or some of them, *and some evidence will have to be given to remove that impression.*

> "Q. To get rid of that impression, you would expect such evidence to come from the defendants, wouldn't you? A. Yes, sir.
>
> Q. And unless such evidence was produced, you could not disregard the impression that you have now as you are talking to me? A. No, I have that impression." (2492)

Challenge was thereupon made for cause, and he reiterated his statement under oath (2492-3). Further questioned by defense counsel, he answered:

> "Q. You understood Judge Talley when he asked you whether the impression you have in your mind would take some evidence on the part of the defendants in this case to remove? A. To disprove?
>
> Q. Yes, to remove. A. Yes, sir." (2493)

He was then questioned by Mr. Turkus, and stated that the impression went to the character and reputation of the defendants (2493).

Then questioned by the Court as to whether he had formed an opinion of the guilt of the defendants on this specific crime, he stated he had not formed an opinion, but had an unfavorable bearing in his mind from the headlines he had seen in the paper, but that the impression was not so deep that he could not disregard it (2493-4).

The challenge was thereupon erroneously overruled, and defense counsel attempted to further question the talesman on the answers given subsequent to their questioning, but permission was refused, and exception taken.

Counsel for Capone protested the ruling and the overruling of the challenge and noted an exception (2522). A peremptory challenge was exercised by defense counsel (2523).

Compare with analysis under talesman *Hamilton*. (See pp. 66-69 of this brief.)

10—JOHN J. DUNPHY (2484-5; 2486-7; 2496-2508; 2522-3)

He was treasurer of the Customs Truckers (2485). He had read about the case in the newspapers and has a sort of an unfavorable opinion of these defendants which goes to the guilt or innocence, and would require some evidence to remove, if accepted as a juryman, and he does not think he could remove it unless he heard evidence (2496-7). He was challenged for implied bias, and sworn, and stated that unless he had evidence to offset his opinion, he could not lay aside the impression which he had formed as respect to the guilt or innocence of the defendants (2497).

He further stated that he sat in court, heard the various instructions given to prospective jurors on the law, and notwithstanding that fact and the different principles which he understood as to presumption of innocence, reasonable doubt, and all the other things, his statement to Judge Talley was true, so that the impression or opinion which he had concerning some of the defendants was of such a nature that it would take evidence on their part to remove before he would be able to lay aside the impression or opinion which he had formed. He acknowledged that he had made this statement, notwithstanding the fact

that he had been told that the defendants need at no time prove their innocence but that it was incumbent upon The People to establish their guilt beyond a reasonable doubt (2498-9). Questioned by the prosecutor, he said the impression which he had formed had been based on reading the "Times," the "Sun," the "News" and other papers (2499).

Questioned by the Court, he said he recalls that the person who is alleged to have been killed was Rosen (2500). Further questioned by the Court:

> "Q. Does the fact you read in the paper they are accused of the murder of Rosen form any impression that they are guilty? A. Not necessarily.
>
> Q. Yes or no? A. No, sir." (2501)

The Court further, by leading questions, procured the answer that the impression which he formed was that they were presently on trial, accused of the murder of Rosen —and went no further than that; that he would set aside the unfavorable impression; decide on the evidence and could follow the instructions of the court (2502).

After the Court and prosecutor had concluded asking the leading questions, which resulted in the answers hereinbefore set forth (2504-5), counsel for Capone asked whether he could ask one question in the nature of rebuttal, but the Court refused to permit it, and an exception was taken (2505). The Court, subsequently seemingly changed its ruling when counsel for Weiss questioned the propriety thereof, but then again refused to permit further questioning, and a further exception was taken (2507). Counsel for Capone, thereupon, asked the following question:

"Q. I have this question to address to you—do not answer until the court rules. When I addressed you and asked you certain questions and you made certain answers, did you understand the questions which I addressed to you and did you answer them to the best of your ability?

Mr. Turkus: I object.

The Court: Objection sustained.

Mr. Rosenthal: Exception." (2507-8)

The challenge was then overruled, and an exception taken (2508).

On the general question, counsel for Capone again sought to question the talesman, but was refused permission, protested the ruling and took an exception (2522).

Exception was taken to the overruling of the challenge, and a peremptory challenge exercised (2523).

Compare with analysis under talesman Hamilton (pp. 66-69 of this brief).

B

1—ALBERT ROSENTHAL (719-727)

He was a fraternal brother of Mr. Wegman, one of the counsel for defendant Buchalter, and at the suggestion of Mr. Wegman and the prosecutor, approached the trial judge to be excused on that ground, but the Court reserved decision until he was actually in the box (719). The last time he saw Mr. Wegman was quite a long time ago (719). The Court thereupon ruled that he would have to be questioned (720).

He stated he had a high regard for Mr. Wegman and had watched his progress in the profession, and thought it was proper to apprise the District Attorney of the fact that he knew him (720). Although he would rather not

serve, he does not know whether it would be embarrassing or not, but he does not think he would pay any greater respect to the argument emanating from Wegman than from any other lawyer in the case, but merely thought it was proper to ask to be excused when he knew one of the defense counsel (722).

Questioned by the Court as to whether he would like to avoid jury service, he said he knew his obligation and even though he would like to avoid it, he would not do it at the expense of doing what he is not supposed to do (722).

Questioned further by the prosecutor, he said if it came to a close question he certainly would not intentionally be inclined to favor Mr. Wegman; in fact he might bend over backwards (724-5). Whereupon, the following took place:

"By the Court:

Q. What is your business? A. Manufacturer.

Q. You presented an application to be excused from jury duty? A. I did not.

Q. What is your concern? A. The Simplex Button Works, Inc.

Q. You are engaged in war work? A. Not extensively; we do a little.

Q. You have no contract to make buttons for soldiers' clothing? A. No, sir, that is a different type of a button.

Q. You mean an electrical button? A. No, sir.

Q. What are they? A. Buttons for ladies' garments, among other things.

Q. What is your position there? A. Up to about October of last year, I was supervisor of production.

Q. What is your position there? A. I do everything, check credit——

The Court: The Court will ask no further questions because the hostility on your part to ques-

tions of the Court is obvious.

The Witness: May I correct that impression, if I seem to have given it.

The Court: The whole courtroom is being upset by your attitude and the attitude of counsel. If one counsel challenges for cause, I will excuse for cause.

Mr. Turkus: Challenge on the ground of implied bias.

The Court: I will excuse him. The Court is being upset by the attitude of counsel and of the talesmen. He may leave. I want no repetition of this. There will be no beating around the bush or substitute for excuses by consent.

Mr. Talley: We don't hear you. We would like to hear you.

The Court: Proceed." (726-7)

In comparison to the ruling above, this Court should note the ruling made in respect to talesman Groden (pp. 80-83 of this brief), who was challenged for cause by the defense because of his close association with District Attorney O'Dwyer who, he was positive, would not bring about an indictment unless he felt sure; who further had read articles about the defendant in the "Mirror," was biased and prejudiced, and had formed an impression unfavorable to the defendants, which he did not think anything would remove from his mind. Nevertheless, the Court overruled the challenge.

Further, compare the ruling of the Court in the case of the instant talesman with the Court's ruling in the ten instances cited in subdivision "A" of this point.

2—BENJAMIN PROTTER (825-88; 965 976)

He has been in the real estate business in France and also is a writer (825), and has a brother, Mannie Protter, who is an attorney (825). He resides with his mother

at 772 Linden Boulevard, Brooklyn, which is his address, but he is staying at the Maryland Hotel for two reasons —one was that when he came back, his mother had not returned from the country, and the second reason was that after he had been called for jury duty, he thought it best to remain away until the question of his services was decided, but he had voted from Linden Boulevard at the Primary Elections, two weeks before (826-7). His lawyer-brother lived at a separate address, which he did not know exactly, nor did he know his brother's clientele or contacts, nor had he ever discussed the business of the Brooklyn Waterfront with his brother (830). He neither knew any of the lawyers, or anyone connected with the District Attorney's office or any of the various persons or organizations mentioned by the district attorney (831-4). His state of mind was such that he could render a fair verdict and nothing interfered with his ability to be a fair and impartial juryman (842-3). He was then asked by the prosecutor as to whether he had ever heard the name of "Peter Panto" and he replied in the negative (843). He would have no prejudice against the prosecution (846).

Questioned by defense counsel, he stated that he did not even know whether his brother ever had a criminal case, and has not heard a thing or read anything about this case or the defendants (851; 853-4).

After the questioning had finished, the prosecutor stated there was a point of law that he must check up in the Judiciary Law on the question of jurisdiction (884-5), and then stated, "I am going to exercise a peremptory challenge. Your Honor has overruled my challenge on residence." The Court, however, assured the prosecutor that he did not understand that he had made a challenge and asked whether he meant the challenge on the question of residence, and stated that he wanted to look

up the law and would submit anything he found on the following morning, after he had an opportunity to check it (886-8). The juryman then tentatively took his seat in the box. On the following day, the Court excused the talesman, and made a detailed statement as to the alleged activities of the talesman's brother in regard to an investigation of a murder of one, Peter Panto (965-6-7), and an exception was taken (967). Thereupon, the prosecutor made a statement for the record in respect to this murder (970-71), and a motion was made, because of the statements of both the Court and the prosecutor, on behalf of the defendant Capone for a mistrial (971-2). The talesman was then again sworn and stated that the answers which he had given on the prior day were true, and reiterated that he did not know whether his brother represented the Brooklyn Waterfront interests, and they had only been distantly friendly, had political differences, and there was not the usual cordiality between them as exists between brothers (973-4-5). He finally stated that he was absolutely free from any prejudice or bias of any kind, had spoken to no one in respect to the case, and would render a fair and impartial verdict based upon the evidence, free of any prejudice, bias or discussion with any member of his family or anyone except the jurymen who were sworn with him (975-6). The Court thereupon stated:

> "So far as the residence is concerned, that challenge is overruled. So far as the other one is concerned, the Court believes that the sitting of this talesman on the jury will create a problem of implied bias which will remain throughout the trial and may affect the result." (976)

He thereupon sustained the challenge, and an exception was taken on behalf of the defendants (976).

Here again is another glaring example of the Court's failure to afford the defendants a fair trial. Protter said that he had no prejudice against defendants or against the prosecution. It was developed by the Assistant District Attorney, however, that Protter had a brother who was a lawyer. Protter had not lived in close association with the members of his family. On the contrary, for many years he had been a resident of Paris and had returned only before the beginning of the present war in 1939. When he resumed his residence in this country, he did not live with his brother. Yet, the Judge took the occasion of this relationship as an excuse for saying in the courtroom that there was a possibility that Protter might have been influenced by the circumstance that his brother, as representative of a Labor Union, had been interested in the murder of Panto. Up to that point, even the most inflammatory tabloid writers had not suggested any connection between defendants and that homicide. The Judge said that he had gleaned the idea from the "Brooklyn Eagle." Finally, he sustained a challenge for implied bias against Protter tendered by the District Attorney (965-976). From the Judge's language, one would derive the notion that the District Attorney was really afraid that Protter would be prejudiced *against the defendants*. Therefore, the Judge had brought the Panto case into this trial. The defendants were confident that Protter was not biased against the defense. Protter was sure that he was not interested in the Panto case. Nobody in the courtroom was concerned about the Panto murder, but the learned Judge nevertheless found a reason for suggesting in the courtroom, before a second juror had been tentatively selected, that defendants could be linked with the murder of Panto! So the Judge, who was afraid that newspaper reading would hamper the selection of a fair jury, thus created more newspaper

hostility, did it without sound reason, and having done it, said and ruled that Protter—who was acceptable to the defendants—could not sit because of "a problem of implied bias." The net result of the Judge's activities was that the prosecution was spared the exercise of a peremptory challenge!

3—WALTER C. PETTERSON (1531-1554)

He was employed by the New York Telephone Company (1547), and there was nothing about the nature of the charge that would prevent him from acting fairly as a juror (1548). He was then asked the following question by the District Attorney:

> "Q. Sir, have you any fault to find or any bias or prejudice against the prosecution for taking one of the perpetrators of the crime and using him as a witness against the others? A. I have nothing against the prosecution, but it would be hard for me to believe the testimony of a confessed accomplice." (1548)

The question was then repeated and an objection taken thereto. The court then asked the talesman whether the prejudice against the testimony of the accomplice is so strong that he would rule it out even though it were corroborated? The talesman replied, "Yes, sir, it would be hard for me to believe that sort of testimony." A challenge was made by the People (1549).

Questioned by the defense on the challenge, he stated he had served on criminal and civil juries and would, to the best of his ability, follow the charge as given by the Judge irrespective of what his own opinion was; and if the Judge were to charge him that an accomplice's testimony should be viewed with suspicion and caution, he

would do so. If he were further told that there must be other evidence besides the testimony of an accomplice, which would tend to connect the defendant with the crime, he would have no difficulty in following that instruction and, to the best of his ability, he would follow the law in respect to accomplices and the necessity of their testimony being corroborated (1550-2). After counsel for the defense had concluded, the Court asked

> "whether or not the prejudice that you have stated is such that you would not give the prosecution a fair, intelligent attitude as to whether or not an accomplice is telling the truth?"

The answer was:

> "It is in my mind."
>
> "Q. Speak out loudly, so counsel can hear you. A. It is in my mind. It would be hard for me to believe that type of testimony." (1554)

The Court thereupon sustained the challenge, to which the defendants excepted. (1154)

The answers of this talesman when first qestioned were correct as a matter of law (1548). (See *People* v. *Kress*, 284 N. Y. 452, 459.)

Comparison should be made with the ten overruled defense challenges contained in subdivision "A" of this point.

4—SAMUEL SILFEN (1557-65)

He is a department store manager for the United Cigar and Whelan Drug Stores, and has no connection with anyone in the clothing district or Brownsville—East New York area (1558-9). The name of Buchalter is familiar as that of a dentist *whom he does not know personally*, but his mother-in-law used him as such (1559). This dentist never visited the home of his mother-in-law, and

the relationship was solely that of dentist and patient (1559-60). He has a slight impression which goes to the guilt or innocence, from matters which he read in the "press" or heard about, which would require evidence on the part of the defendants to remove (1560-1). He was thereupon challenged by the prosecutor (1561).

Questioned by defense counsel—he had heard the Court speak of presumption of innocence and every juryman must accept the law from the Court, with which he agrees, and if the Court charges that the defendants in this case are presumed to be innocent under the law, he would accord that presumption to them (1562). If the Court were to charge that no unfavorable inference could be drawn from the failure on the part of defendants to take the stand and they need offer no proof of their innocence, he would accept that law from the Court (1562-3). He is willing to undertake to lay aside the slight impression he has and accept the law from the court, and will make every effort to dismiss from his mind this slight impression (1564).

The challenge was thereupon sustained (1565).

Comparison should be made with the ruling in respect to talesman Groden. (See pp. 80-83 of this brief.)

5—BENJAMIN COHN (2223-2233)

He is an architect (2223), and some time ago, had contact with builders who have their place of business or were engaged in construction work in Brownsville, East New York section (2224). He heard the name of Martin "Buggsy" Goldstein, but not the name of Strauss or Anastasia, but has also heard the name of Gesule Capone, but it is nothing more than a name to him (2225). Thereupon the prosecution stated:

"I think there is a question of bias." (2226)

He did not recognize the name of any of the nine lawyers for the defense, although he had heard the name of one of them, Mr. Barshay; he never heard any discussions about the Rosen case, but he does not like to see anybody punished, and is not in favor of capital punishment (2228-9). (He was not properly asked as to whether he had any conscientious scruples against same.) Questioned by Mr. Turkus:

> "Q. I think you said to the Judge that you are not particularly in favor of punishment? A. Yes.
> Q. Would that enter into your mind when you are deliberating a case, your feeling that you are not particularly in favor of punishment?" (2229)

This was objected to as not being a proper question or correct statement of law, and it was overruled, and an exception taken, and the answer was:

> "It may prejudice me.
> Q. Yes. So that, as it has been brought out by one of the lawyers for Buchalter that he has been convicted of past crimes and he is serving a long jail sentence, would not that feeling that you have cause you to relax your duty in this case? A. It would." (2229)

He was thereupon challenged by the People (2230), and in answer to questions propounded by defense counsel, stated as follows:

> "Q. If the judge shall tell you, if you are taken as a juror, that the question of punishment is not for you, you must not consider it, it is fixed by law, you have nothing to do with it, will you follow that instruction of law? A. Yes, I will." 2230-1)

Thereupon, Mr. Turkus re-questioned the talesman and

asked him whether he had not said that in view of the convictions for past crimes of Buchalter, he would relax his duty as a juror, to which an objection was made on the ground that it had nothing to do with the challenge. This objection was overruled, and an exception taken (2230-1).

> "Q. Was your answer yes? A. I did not hear you." (2231)

Over objection and exception, he admitted having stated that because of the previous crimes for which Buchalter was sentenced, he would be inclined to relax his duties (2231-2). The following then occurred:

> "Q. If that is your state of mind, Mr. Cohn, that you are against punishment and you would relax your duty, how can you lay that state of mind aside? A. I am against capital punishment.
> Q. You are against capital punishment? A. Yes.
> Q. And you have a conscientious scruple? A. Yes." (2232)

Whereupon, the challenge was again pressed.

Questioned by defense counsel, the talesman admitted signing a qualifying affidavit as a special juror (2232-3). He was then asked:

> "Q. Do you remember that? A. I am not in favor of capital punishment. Of course, if the Judge rules, I would follow out his Honor's, whatever he wanted.
> The Court: You understand a murder trial is not a debating society.
> (The talesman speaks to the court.)
> Mr. Barshay: No further questions.
> The Court: Sustained." (2233)

Compare with the ruling in respect to talesman Koehler. (See pp. 88-89 of this brief.)

6—HARRY ROSENBLATT (2367-73)

He is a special representative for the Standard Brands Food Products (2367), and prior to that was selling for a manufacturer in the dress line, out of town, and did not know much about what was going on in the City (2368). However, the names of Lepke and Gurrah are both familiar to him, and he has an impression which does not go as far as an opinion (2368). He casually met the defendant Buchalter about eight years ago (2368-9). Asked by the Court, he stated he was not prejudiced (2369).

The circumstances under which he met Buchalter was while he was with certain friends of his one of the persons introduced him at a night club, but Buchalter did not make much impression (2370-1).

Questioned by the Court, he said he did not drink with him, he was not a member of the same party, he was merely introduced and that was all; and it was about eight years ago and there was nothing more than a single introduction (2371). Whereupon, the Court stated:

> "Is there a challenge here?
> Mr. Turkus: Implied bias.
> The Court: Try it." (2371)

The talesman was sworn and stated that the introduction was at a time when he was dealing with merchants who dealt in flour, but it was not one of those merchants who introduced him (2371).

> "Q. Didn't you tell me you have an impression about the name of Lepke? A. No.
> Q. You associate the name of Lepke with Buchalter? A. Yes.

Q. You are familiar with the name Gurrah? A. Yes.

Q. You earn your livelihood by dealing with people who buy flour? A. I do.

Q. That is one of your commodities? A. I do.

Mr. Turkus: Challenge for implied bias.

The Court: Any questions.

Mr. Rosenthal: No questions." (2372)

The challenge was thereupon sustained, and exceptions were taken thereto (2373).

It should be noted that this challenge for implied bias was sustained because the juryman earned a livelihood by dealing with people who buy flour, and although he had no impression of any character detrimental to the defense, and he was not biased against the People, the challenge was sustained. As a standard of comparison, see analysis under talesman Groden (pp. 80-83 of this brief).

THE LAW

Under subdivision "A" of this point we have fully discussed and analyzed the overruling of the challenges for cause made by the defendants, necessitating the exercise of ten peremptory challenges. It is contended that in each one of these cases the defendants established, upon cross examination, that actual bias existed in the minds of these talesmen because of reading articles, the presence of impressions formed as to the guilt or innocence of the defendants, knowledge and adverse opinions as to the deceased defendant Strauss herein, and various other prejudicial causes therein expressed by the individual talesmen.

The Code of Criminal Procedure of the State of New York defines actual bias as the existence of such a state of mind on the part of the juror, in reference to the case, or to either party, as satisfies the Court that the juror cannot try the case impartially and without prejudice to

the substantial rights of the party challenging (Sec. 376).

In the case of *People* v. *McQuade*, 110 N. Y. 284, the Court said at page 301:

> "* * * Now, as formerly, an existing opinion by a person called as a juror, of the guilt or innocence of a defendant charged with crime, is *prima facie* a disqualification, but it is not now as before a conclusive objection, provided the juror makes the declaration specified, and the court, as judge of the fact, is satisfied that such opinion will not influence his action. But the declaration must be unequivocal. It does not satisfy the requirement of the statute if the declaration is qualified or conditional. It is not enough to be able to point to detached language which, alone considered, would seem to meet the statute requirement, if, on construing the whole declaration together, it is apparent that the juror is not able to express an absolute belief that his opinion will not influence his verdict. * * * Fairly construed, their declaration of their belief that they could render an impartial verdict was qualified by a doubt and was not sure and absolute."

In most of the aforementioned overruled challenges, the talesmen had definitely expressed an opinion and had further expressed a doubt as to their ability to overcome such prejudicial opinion without a different quality of evidence than in the ordinary case. In an attempt to overcome this testimony of the talesmen given on cross examination by defense counsel, either the court or the prosecutor sought from the talesmen a categorical answer to the effect that they could disregard this prejudice.

In the case of *State* v. *McCoy*, 33 So. 730 (Supreme Court, Louisiana), the defense challenged a juror named Meaux for cause, on account of imperfect acquaintance with the English language and on the further ground that

he had formed an opinion on the merits of the case which would require strong evidence to overcome. The Court denied the challenge. Defense challenged him peremptorily. Before the jury was completed, the defense exhausted its peremptory challenges.

Examination of the juror disclosed:

1. That he had heard of the crime;
2. That he had formed an opinion which could be changed by witnesses;
3. That he could try the case strictly on the evidence from the witnesses;

On Cross-examination:

4. That he had formed an opinion which would require strong evidence to overcome;
5. In determining the case, his mind would be influenced by his present opinion;

By the Court:

6. His opinion is not a fixed opinion;
7. It would give way to testimony;
8. He feels he could disregard the opinion and decide the case strictly on the evidence.

The Court said:

"Taking the whole of the examination of this witness together, the most that can be made of it is that he had formed and expressed an opinion that it would have required strong evidence to overcome; that his mind was not in a condition to be influenced solely by the evidence to have been submitted on the trial, and that it would have been influenced to a great extent by the opinion formed already; but that, nevertheless, he could have gone into the jury box and, as we take it, if the evidence proved strong enough to overcome it, have disregarded that opinion and have decided the case upon such evidence. We do not consider that he would have made a good juror, and are of the opinion that the challenge for cause should have been sustained. *People* v. *Casey*, 96 N. Y. 115;

Rizzolo v. *Com.* 126 Pa. 54, 17 Atl. 520. The fact that, having been challenged peremptorily, he did not sit on the jury, does not cure the difficulty, inasmuch as it appears that all of the defendant's peremptory challenges had been exhausted before the jury was obtained. *State* v. *Fouchy*, 51 La. Ann. 229, 25 South., 109."

It was said in *People* v. *Casey*, 96 N. Y. 115, at pp. 122-3, by Earl, J.:

"• • • When persons called to sit as jurors are otherwise incompetent from actual bias, they must be required to make the declarations specified in the section of the Code quoted. They need not make those declarations literally, but they must make them in substance; that is an absolute prerequisite; and then if there is nothing in their further examination materially impeaching such declarations, the court may receive them as jurors, if satisfied that their opinions and impressions will not influence their verdict."

In *Grand Lodge A. O. U. W.* v. *Taylor*, 99 Pac. 570 (Supreme Court, Colorado), the juror Dietz was challenged for cause. The trial court denied the challenge. The Juror was peremptorily challenged. The Court said:

"We think the court should have excused this juror from the panel, as his examination, taken in its entirety, shows bias for plaintiff, and that, as to him, defendant would be required to prove its affirmative defense by a greater preponderance of the evidence than the law requires. The defendant is in a position to urge this point because it had exhausted all its peremptory challenges before the panel was filled, and one of the jurors peremptorily challenged was Dietz."

It will be further noted that in the questioning of these

talesmen by the District Attorney and Court, in most instances the Court either attempted to exact a promise from the talesman to the effect that he would lay aside his prejudice, or the prosecutor attempted to exact a promise that the talesman would follow the law as given to him by the Court.

In *People* v. *Wilmarth*, 156 N. Y. 566, it was held that such questioning was insufficient to qualify the talesman. At page 568, Parker, Ch. J., said:

> "We will now turn to the record for the purpose of ascertaining whether Hollenbeck made such a declaration as the statute calls for; for if he did, the determination of the trial court, that he was a properly qualified juror, has evidence to support it, and it may not be reviewed in this court. But if he did not, then the court erred as a matter of law in overruling the challenge interposed by the defendant.
>
> A question was asked by the district attorney which presents the appearance of having been intended as a compliance with the statute. It reads: 'Q. In spite of any prejudice or any opinion you might have, you would go into the box and decide the case upon the evidence that was given here under the law as laid down by the court, would you not? A. I would.'
>
> It will be observed that the question did not call for the belief of the juror, nor did it direct his mind to the inquiry which the statute demands, whether, in his opinion, he believed that such an opinion or impression would not influence his verdict. The statute calls for the belief of the witness upon two subjects: *First*, whether the opinion or impression which the juror has will influence his verdict; and, *second*, whether he can render an impartial verdict according to the evidence. The question put omitted entirely to inquire of him whether he believed that the opinion or impression

he had would not influence his verdict. The statute not only requires such inquiry, but it is a most important feature of its provisions. It directs the attention of the witness to the fact that he is expected to make a careful analysis of his opinions or impressions, and then to declare on oath his belief as to whether they will influence his verdict. This was entirely omitted, as we have seen; the question did not even attempt to cover anything except the succeeding provision of the section, which is that the juror believes he can render an impartial verdict according to the evidence. And as to that provision, the belief of the witness was not asked, nor was an equivalent expression employed, as in *People* v. *Martell* (138 N. Y. 595). Instead, the witness was asked whether he 'would decide the case upon the evidence?' The question suggested to him his duty, and, as an upright man, he readily promised to do it. But such a promise is not in compliance with either the letter or the spirit of the statute, which seeks, *First*, to direct the mind of the juror to a careful introspection, to the end that he may be able advisedly to declare on oath his belief whether the opinions or impressions which he has will influence his verdict; and, *second*, whether he can render an impartial verdict according to the evidence. This statute is the outcome of many years of experience of lawyers and judges in the trial of criminal causes, and it should not be frittered away by a recognition on the part of the courts of loose or ill-considered substitutes as equivalents."

Under Sections 383 and 384 of the *Code of Criminal Procedure of the State of New York* the right is given to either side to examine the talesmen under the rules of evidence applicable to the trial of other issues, governing the admission or exclusion of testimony. The error committed by the court was aggravated by the refusal to permit defense counsel to indulge in recross-examination of

the talesman after perfunctory questions had been asked by either the court or district attorney, which seemingly dispelled the prejudice expressed by the juror in his cross-examination by defense counsel. (We cite: Flannagan, 1960-3; Jacobus, 2522; Dunphy, 2505-8; 2522). Although these three talesmen had definitely expressed prejudice to defense counsel prior to being challenged for cause, which as aforstated was presumably dispelled by the pro forma questions asked of them by the court or the prosecutor, defense counsel had no opportunity to question further. It needs no citation of law to convince this Court that the elementary rules of evidence permit recross-examination of any witness on seeming contradictions established on redirect examination. But notwithstanding this refusal to permit defense to recross-examine, an entirely different standard was established in those cases where the prosecutor had challenged for cause and defense counsel had dispelled same. In such case, the prosecutor was permitted to re-examine.

In the cases aforecited the courts have universally held that where a talesman had formed an opinion which would require strong evidence to overcome, it would be grounds for his disqualification. However, the Court erroneously ruled on several occasions during the course of the examination of talesmen that counsel had no right to ask of the talesman questions similar to the following:

> "Do you feel, sir, that because of your condition or state of mind that the quality of evidence that would be necessary for the District Attorney to produce in this case would be less than would be ordinarily true were you sitting in a case where you did not have any impression against the defendants?" (1960)

Moreover, the Court's remarks in the presence of the

jury relative to the alleged abuse of the exercise of peremptory challenges (Cleary, 1295-6; also, Kendy, 426) further aggravated the conditions and deprived the defendants of procuring a fair and impartial jury. How unjust this accusation of the Court was can readily be ascertained by a perusal of the testimony of talesman *Gillespie* (1742-1861) who stated that he had found a body in the rear of his building, which he attributed to "Murder, Inc.," had found the dead body of Mrs. "Legs" Diamond in one of his buildings, and who further stated that Mr. Moorehead, the Chief of the Indictment Bureau in the District Attorney's Office, was an acquaintance of his, but against whom the defense did not even present a challenge for cause, but excused peremptorily.

In *People* v. *McQuade, supra*, at p. 294, it was said:

> "• • • Both the prosecution and the accused may reject, on peremptory challenge, a qualified juror without assigning cause. The right of peremptory challenge was originally given to the accused that he might exclude from the jury a juror against whom he entertained a prejudice, although not founded upon any reason which would disqualify him. So, also, where he has a preference in favor of a juror legally selected and qualified to sit, who is not peremptorily challenged by the prosecution in the first instance, the observance of the statute secures to the accused his presence on the jury."

At page 293:

> "• • • The right of peremptory challenge given to an accused person is a substantial right. BLACKSTONE says: 'It is full of tenderness and humanity to prisoners, for which the English laws are justly famous.'"

The standard set up by the Court in overruling the challenges of the defendant was entirely different from the standard utilized in sustaining the six challenges urged by the People and contained in subdivision "B" of this point.

The talesman *Rosenthal* was merely an acquaintance of one of the counsel, which under the law is not a valid cause for challenge (See *People* v. *McQuade, supra*), but the challenge was sustained.

The talesman *Protter* stated he had absolutely no bias whatsoever, but the Court interjected that his brother, who was a lawyer, had represented some waterfront interests, and the challenge for cause was sustained.

The talesman *Petterson* merely stated that he would exercise caution before accepting the testimony of an accomplice, and the challenge for cause was sustained.

The talesman *Samuel Silfen*—his mother-in-law had used a dentist named Buchalter, whom he did not know personally, but the challenge was sustained for cause.

The talesman *Benjamin Cohn* had heard the name of Martin "Buggsy" Goldstein and the name of Gesule Capone (not the defendant), which was nothing more than a name to him, and although against capital punishment, would accept the law, but the challenge was sustained.

Lastly, the talesman *Harry Rosenblatt* had been casually introduced to the defendant Buchalter eight years before, but it had left no impression. His challenge was sustained.

In no one of the six cases aforementioned was there any legal case of implied bias or actual bias established by the prosecution which would warrant the Court in sustaining the challenge. However, the erroneous rulings of the Court saved the prosecution six peremptory chal-

lenges. The sustaining of these challenges were erroneous as a matter of law.

We have dealt with the question of the challenges exercised by the defense prior to their exhausting the thirty peremptory challenges alloted to them. Prior to dealing with subdivision "C" in relation to the talesmen *Rorke*, *Links* and *Coleman*, we would like to call attention to certain circumstances concerning two of the jurymen who had been seated in the jury box as jurors "8" and "10" respectively.

Juror No. 8, *Philip Strober*, upon his examination, had made known his acquaintanceship with Irving Feinstein and Feinstein's deceased brother, "Puggy" Feinstein. (See *People* v. *Goldstein & Strauss*, 285 N. Y. 376). He was tentatively permitted to remain in the jury box. At that time, the defendants had exhausted but nineteen of their peremptory challenges. Although the Court had been requested on several occasions to remove this juryman, it was not until the defendant had exhausted twenty-nine peremptory challenges (2578) that the Court excused this juryman from the box.

John D. Butt had been seated in the jury box as Juryman No. 10, and upon the removal of Strober, became juryman No. 9. He was the Vice-president of the Seaman's Bank for Savings, and throughout his questioning had stated that he had never read about the case and had formed no opinion or impression nor had he ever heard the names of the defendants discussed (2246-54; 2258-60; 2261-3). He remained in the jury box for a number of days and until the jury box was completed, at which time it was suggested by counsel for the defendant Capone that the Court inquire whether anything had happened that would change any of the answers previ-

ously given by any member of the jury. Whereupon, this juryman raised his hand, and a discussion ensued at the bench, at which time he stated: "There has just been a great conviction on my part towards prejudice in this case," although he had spoken to no one since his entry into the jury box. The Court thereupon stated that the challenge could not be tried and it had to be done quietly, without the presence of the jury, and asked counsel whether they all consented, which was agreed to; defendants' counsel reserving the exceptions which had theretofore been taken (2690; 2691).

C

1—JOHN J. RORKE (2586-9; 2603-27)

He is a nephew of Inspector Rorke, who has been on the police force for thirty odd years, assigned to Brooklyn traffic (2588; 2603). He had been a prospective juror on a blue ribbon panel in which Mr. Turkus had been the prosecutor (2605). At that time, he did not hear the name "Buggsy" Goldstein, but, of course, he heard the name "Maione" when he was previously questioned. The other names, however, do not mean anything to him (2605-6).

Questioned by defense counsel, he stated he had been excused as a juryman in the Maione case* (2607).

> "Q. Well, about how many names would you say that were mentioned then, that you recollect as being mentioned here today or yesterday or the day before? A. One of the defendants.
>
> Q. Maione and one of the defendants at the present time? A. Maione.
>
> Q. Was mentioned then too? A. That is correct.
>
> • • • •

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* The Maione case was a murder trial in which counsel for this petitioner appeared for the defendant Maione.

Q. And thereafter did you follow the case with interest in the press? Did you read about it? A. Only to the effect of the decision that was arrived at.

Q. I do not know whether you remember all the counsel in that case? A. I do remember two of them.

Q. I was not one? A. Just Mr. Rosenthal was there of the present group and Mr. Turkus." (2606-7)

At this point counsel requested the Court's permission to approach the bench, and a conference was held as to this juryman's qualifications, in view of his having been called in the Maione case and excused by defense counsel. For some reason, this conference has been omitted from the record. After the conference, however, the court asked the talesman a number of questions as to whether he had formed any opinion concerning any of the defendants and whether he had any impression because of the prior case that he had been called as a juryman, and he answered in the negative. A challenge was thereupon made on the ground of implied bias (2609). He was examined upon the challenge and stated that he had been called as a juryman about five or six months ago, in a murder case in which Mr. Turkus was the prosecutor and Mr. Rosenthal was one of the counsel for the defense, and he was challenged as a juror by Mr. Rosenthal (2610-11).

"By the Court:

Q. Do you attribute your excuse to either of the counsel in the case? A. Yes, sir.

Q. Do you charge it against one particularly? A. Yes. I would charge it against one who was questioning.

Q. Do you carry a grudge? A. No." (2611)

He admitted that certain names were mentioned in that case, and at least one of those names he heard since he was called in this case. Questioned further as to whether he followed the developments of that trial with any interest, after he was excused, he answered, "I just made it a point to——" (2613).

The challenge was thereupon overruled, and an exception taken. (2617).

2—WILLIAM P. LINKS (2660-89)

He as a radio producer and was on one of the panels of one of the murder cases that Mr. Turkus prosecuted and in which Mr. Rosenthal was one of the attorneys. At the time, he had stated that he was the radio announcer on a program known as "Mr. District Attorney", and had been called into consultation with reference to the script thereon (2660). He has trained various actors and actresses in technique (2661). When called as a juror in the previous case, he heard some of the names mentioned in the case, among which were Maione, Abbandando, Strauss, but does not recall whether he heard the names of any of the defendants in this case (2661-2).

> "Q. Did you follow the case thereafter with any degree of curiosity? A. Not to any great extent except I wanted to find out what became of the case on the last day of the trial." (2662)

He was not excused on a cause challenge on the last trial, and was not prejudiced one way or the other, because of his having been excused peremptorialy (2665). He read headlines about this case but it did not leave any extraordinary impression (2669). He had been excused by the People in the other case (2682). Mr. Turkus thereupon questioned him:

"Q. At that time I believe you were identified with a program of some sort? A. Yes.

Q. Do you understand that that may have been a question of propriety at that time? A. Yes, sir.

Q. In other words, there is no resentment because The People excused you? A. No, sir." (2689)

Mr. Turkus thereupon stated the talesman was satisfactory, and, the peremptory challenges having been exhausted, the defense rested on the record. A similar discussion with the Court in respect to this talesman was had, as hereafter set forth.

3—JOHN E. COLEMAN (2691-2707)

He was a business representative of the Brooklyn Edison Company (2691), and questioned by one of the defense counsel, said he had read quite extensively about this case in the "World-Telegram" and the "News." He stated, however, that he would be impartial although it was inconvenient for him to serve because of conditions at home (2697).

The People announced that he was satisfactory, and the defendants, having exhausted their thirty challenges, rested on the record (2707).

The three jurymen, *Rorke, Links* and *Coleman*, who actually served on this case as jurors numbered "10," "11" and "12," mentioned in Subdivision "C" of this point, were all questioned subsequent to the exhaustion of the thirty peremptory challenges accorded to the defendants.

As to the juryman *Rorke*, his examination is fully set forth under subdivision "C" (pp. 115-117), but the record

is barren as to the discussion with the Court relative to the challenge made by the defendants for cause. This challenge was made before the Court, without the hearing of the jury, because of the situation with which the defense counsel were confronted. This juryman had been summoned as a talesman in the Maione-Abbandando case and had been peremptorily challenged by the present defense counsel for Capone. He had heard the name of Capone, and had followed the verdict in that case. He was the nephew of a prominent Police Inspector which presented a question of implied bias far more critical than anything displayed in the examination of *Protter, supra,* against whom the People's challenge for cause was sustained. Nevertheless, the Court, overruled the challenge and an exception was taken.

As to juryman No. 11, *William P. Links,* the typewritten record is also incomplete. Like *Rorke,* he had been called to serve on the jury in the Maione case, but had been excused by the District Attorney who stated in that case that because of the connection of said Links with the radio program known as "Mr. District Attorney," he, the prosecutor, did not consider he would be a fair juror to the defendant. A similar discussion was had as to a challenge against Links, without the hearing of the jury, but the Court did not entertain same, and the very same prosecutor who, in the Maione case, considered this man to be prejudiced against the defendant, announced he was satisfactory to the People. Whereupon, the defense excepted and rested on the record. (This exception does not appear in the typewritten record.)

As to the 12th juryman, *John E. Coleman,* upon questioning, he said he had read quite extensively about this case, but protested, however, that he would be impartial. Having no further peremptory challenges, defense counsel rested upon the record.

The law laid down in the cases heretofore cited definitely establish the fact that the defendants were deprived of a fair and impartial jury for the following reasons:

1. Ten defense challenges for cause were erroneously overruled, necessitating ten peremptory challenges;
2. Six challenges for cause made by the People were improperly sustained, depriving the defendants of the presence of those individuals upon the jury, or saving to the prosecution the exercise of six peremptory challenges; and
3. After the defendants had exhausted their thirty peremptory challenges, two biased jurors were improperly permitted to remain and deliberate on the guilt or innocence of the defendants.

The pragmatic proof that the defendants were deprived of a trial before a fair and impartial jury is found unequivocally in the fact that the defendants found themselves unable to exercise peremptory challenges against *Rorke* and *Link*. (*People* v. *Casey*, 96 N. Y. 115, 123).

It may be contended by the learned district attorney that the allowances or disallowances of the challenges by the trial court are not subject to review by reason of the provisions of Section 749-aa of the Judiciary Law of the State of New York. Subdivision 7 of that statute, so far as pertinent here, provides.

> "Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not

be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final."

It surely cannot seriously be contended that this statute would preclude this court from reviewing the rulings of the trial court as to challenges where they lead to a conviction without due process of law in contravention of the Fourteenth Amendment of the Constitution. The district attorney surely cannot contend that even if such rulings lead to the impanelling of so prejudiced and biased a jury (who, incidentally, had already formed an opinion as to the guilt of the person on trial), as to result in a trial which was one only in form, that such action could not be reviewed. Such contention would be specious. If there were any merit to such contention, a prejudiced court could deny a defendant a trial and only grant the pretense of one. This court undoubtedly has jurisdiction, regardless of any statute providing for the finality of a ruling by a state court, to review such ruling where it is claimed that it abridged or denied a constitutional right. Therefore, such portion of the Judiciary Law of the State of New York as provides for the finality of the allowance or disallowance of challenges is in contravention of the Constitution and should be declared unconstitutional.

III.

Under the facts in this case, and the prejudice created against the defendants because of the adverse newspaper publicity, coupled with the atmosphere in the courtroom, and the condition of the prospective juror's mind, the Court's constant refusal to grant a severance to defendant Capone utterly deprived him of a fair and impartial trial, and granted him but a mere pretense of one. If

the facts in this case do not warrant a severance, we doubt whether any case within the annals of criminal law will warrant one.

It cannot be gainsaid that the numerous errors committed upon the trial, plus the abundance of prejudicial evidence admitted, but not in any wise applicable to defendant Capone, was of such a nature that the jury must have been unduly influenced to such a degree that it could not dismiss such prejudice from its mind and fairly determine the issue, thus depriving the petitioner of his constitutional rights to a fair and impartial trial, and affording him but a pretense of one.

Although we quote from the minority opinion in *People* v. *Fisher*, 249 N. Y. 419, at 432, we do so for the reason that the facts affecting Capone in this case peculiarly fit the wording of Chief Judge Lehman. We quote:

> "Certainly jurors are not accustomed to weigh evidence in that manner, and I confess that neither legal training nor long judicial experience has given me the ability to do so. The jury might perhaps separate the issues raised by each defense and consider only the competent and relevant evidence bearing on those defenses, but it seems clear to me that in weighing the credibility of the testimony against Fisher, they could not and did not ignore knowledge derived from other evidence which lent credibility to that testimony. In the final analysis the confession of Dreitzer and the admissions of Helfant led inevitably to the conviction of Fisher, and if the testimony relevant to Fisher's guilt had been weaker and his own testimony stronger, the result would have been the same."

Prior to the trial (June 5, 1941) a motion was made for a severance (R.pp. 31-54) which was denied without prejudice to renewal before the trial court (R.pp. 29-30).

This motion was orally renewed before the trial court on August 4, 1941.* (s.m. pp. 12-13), and a further affidavit, dated the same day, was submitted in support thereof (R.pp. 55-64). This motion was denied (s.m. p. 27) and an exception taken (s.m.p. 28). On September 15, 1941, before the trial court, after defendant "Farvel" Cohen had moved for a severance, to which the District Attorney consented,** (s.m.p. 59), the application of Capone was again renewed on additional papers (Mirror articles s.m. p. 59) but was denied (s.m.p. 60).

Subsequently, and throughout the trial, motions were constantly renewed for a mistrial and severance. (See testimony of Tannenbaum, R.p. 2240; Rubin, R.p. 2377; Aman, R.p. 2683; Bell, R.p. 2698; Ryan, R.p. 2703; Winne, R.p. 2706; end of People's case, R.p. 2715; end of entire case, R.p. 3541 and on sentence R.p. 3996).

Thus, throughout the trial, the jury had a parade of witnesses, none of whom referred to Capone, but who constantly testified to matters which would have been excluded were Capone on trial alone. Days were devoted to talks of Union activities and alleged gangsterism commencing in 1923 (thirteen years before the killing of Rosen) coupled with the names of persons, living or dead, none of whom ever knew or saw Capone or had any connection with the issues involved. (See testimony of Berger (R.pp. 1781-95 et seq.), Rubin (R.pp. 1293-1320 et seq.), Mrs. Rosen (R.pp. 246-56), Harold Rosen (R.pp. 466-83), and Sylvia Greenspan (R.pp. 567-84). The flight of Rubin and alleged flights of Buchalter (charged as not connected with this case) and Weiss were prejudicial to Capone, although not admissible if he were on trial alone.

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* This motion is also omitted from printed record. Reference to unprinted stenographer's minutes.

** Previously denied by trial court on August 4th (s.m.p. 27).

(See testimony of Rubin (R.pp. 1381-1420, 1685-1700 et seq.), Maguire (R.p. 1761), Berger (R.pp. 1814-25 et seq.), Aman (R.pp. 2607-86), Bell (R.pp. 2687-98), Ryan (R. pp. 2699-2703), Winne (R.pp. 2704-06), Malone (R.pp. 3493-3508), Whalen (R.pp. 3509-17), and Newman (R.pp. 3518-21); also, People's Exhibits Nos. 33 to 57 inclusive). At the opening of the trial, counsel for Buchalter admitted he was then serving a long term prison sentence. In summation, Buchalter's counsel admitted and condemned his past activities and the vicious circle domineering the Unions (R.pp. 3546-7), and after counsel for Capone had concluded summation, the District Attorney reminded the jury of the statement of Buchalter's counsel and further named Buchalter as "the Czar of the industrial rackets with a half a million dollar take (R.pp. 3783, 3801). Spoliation of evidence was charged as to the alleged shooting of Rubin (R.pp. 3882-3).

These are some of the major happenings which permeated the atmosphere during the trial, and taken together with the notoriety surrounding the co-defendants, fully discussed in the motions for a Change of Venue (R.pp. 110-175) (the denial of which is also urged as a Specification of Error, and is fully discussed in the petition and brief of the co-defendant Buchalter), plus the fact that practically all of the prospective jurymen examined, as well as the twelve men who finally constituted the jury, had heard about defendant Buchalter or Weiss or both, and you find a situation unparalleled in any case heretofore reported.

The error was substantial and deprived defendant of a fair trial at the hand of his peers. Moreover, the motion made before the trial for such relief was predicated on the ground that a denial thereof would deprive petitioner of a trial guaranteed to him by the Constitution of the United States (R. pp. 36-7; 42-3). Thus was a

constitutional question presented and passed upon by the court below.

IV.

THE COURT'S UNWARRANTED INVASION OF THE PROVINCE OF THE JURY THROUGHOUT THE TRIAL, ITS CHARGE, AND DURING THE REQUESTS TO CHARGE. UNWARRANTED RESTRICTION OF CROSS-EXAMINATION BY DEFENSE COUNSEL AND CONDUCT THROUGHOUT THE TRIAL DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

It was upon the veracity of the testimony of Bernstein and Magoon, and that alone, that the jury was compelled to determine the issue involved as to Capone. For that reason, counsel for Capone in his summation to the jury called their attention to the various major discrepancies and contradictions which permeated the testimony of both, including Bernstein's affirmance of the fact that where Cohen's life was at stake in the mountains he lied, "knowing that he did wrong" and Magoon's statement that since childhood he had indulged in "little white lies." Unquestionably, the trial court must have felt that the summation had made a definite effect upon the jury, for throughout the charge the Court indulged in what might be termed a second summation for the People in an attempt to destroy the effect thereof. The Court's invasion of the jury's province particularly affected Capone's right. It can easily be seen why the jury convicted, despite the paucity of evidence, when we analyze the charge and note the deft manner in which the court sought to and succeeded in destroying the effect of the summation. Nor did the Court permit the jury to hear the exceptions to the charge noted by defendants' counsel. In effect, the court's charge deprived the jury of exercising its free will in judging the effect of the contradictions contained

in the testimony of the witnesses Bernstein and Magoon.

(A) The Court informed the jury that cross examination was a "hit or miss; it is blank cartridge shooting;" and that no two people can agree on its fairness (R.p. 3903). Exception taken thereto (R.p. 3981).

(B) The Court thereupon went on to explain to the jury that it was "an unholy thing" to expect witnesses to remember answers given on previous trials and characterized it as a "normal response" for a witness, when confronted with his previous testimony, to answer, "If it is in the book, it is so" (R.p. 3894-5). Exception taken (R.pp. 3985). This charge was particularly applicable to the defendant Capone since it applied to answers given by the witnesses Bernstein and Magoon, and was dwelt upon in summation by Capone's counsel (R.pp. 3726, 3728-9).

(C) The Court emphasized Magoon's answers in relation to the "little white lies" and warned the jury "not to let the decision of so important a case as this turn on a question of mockery or ridicule • • • of a specific witness for a stupid answer such as that." This portion of the charge was specifically directed at Capone's counsel, who discussed the question in his summation, and is particularly applicable to the defendant Capone as it involved the so-called corrroborating witness Magoon (R.pp. 3750-1; 3753).

(D) The Court instructed the jury to disregard matters in regard to the alleged recollection concerning testimony the witness had given before the grand jury as compared to that given at the trial (R.pp. 3899-3900). This portion of the charge was also directed at counsel for Capone, as reference to accomplice Bernstein's discrepancies between the grand jury minutes and the testimony on the trial was called to the jury's attention in the course of his summation (R.pp. 3733; 3744-5): This erroneous

instruction is also particularly prejudicial to Capone since it involved the credibility of the admitted accomplice's testimony.

(E) The Court further charged the jury in connection with the discrepancy existing between the testimony of the People's witnesses Berger, Rubin and Bernstein regarding the alleged meeting between Bernstein and Capone in respect to the theft of the automobile in preparation for the crime. The invasion of the jury's province, by the trial court, to determine the credibility of the witnesses in respect to any alleged fact involves the rights of all defendants, but like in the other instances quoted, it particularly involves defendant Capone since the veracity of the testimony of the accomplice Bernstein was again questioned.

Coupled with the court's criticism of counsel in its charge to the jury (R.p. 3896), to which exception was taken (R.p. 3986), and the fact that it is elementary law that, when submitted to a jury, the credibility of all witnesses is exclusively within their province, the unwarranted invasion by the court of that inherent right deprived defendant of his right to a fair trial.

(F) The Court unjustly curtailed the cross-examination of counsel for Capone on numerous occasions and refused to permit counsel to examine the witness on matters which were either brought out on direct examination or on previous cross-examination on behalf of other defendants. At the same time, in many instances the trial court made disparaging remarks either about the purpose of counsel or the materiality of the evidence sought to be adduced, and at various times invaded the province of

the jury and gave the Court's interpretation of the import or meaning of the testimony and the ability of the witness to testify concerning certain matters.

Both Court and prosecutor sought refuge in the magic word "Repetitious" to bar the right of proper cross-examination, the Court holding that if the prosecutor had originally asked the question, it would be repetitious to cross-examine the witness thereon and elicit, if possible, a contradictory reply, which would thereby tend to destroy the witness' credibility.

The instances are so many that, for the sake of brevity, we merely quote some of the pages from the record. (Bernstein's testimony: 1131-4; 1139; 1169; 1175; 1176; 1177-8; 1180; 1194; 1195; 1198-1200; 1201-2; 1227-8; Mc-goon's testimony: 2532; 2586-9.)

(G) The Court unwarrantably restricted cross-examination of People's witnesses on questions (a) directly affecting their credibility and (b) tending to show what consideration was being given to them for their testimony. Objections and exceptions were taken thereto (R.pp. 1094-5; 1136-9; 1144; 1146; 2531-2; 2597-8.)

(H) Numerous instances appear throughout the trial where the Court also invaded the right of the jury by interpreting the witnesses' answers and ability to answer (R.pp. 3894; 3898-9).

These actions persisted until counsel for defendant Capone finally moved for a mistrial on the ground "that the action of the Court toward defense counsel and upon the observations of this Court throughout this trial as to the testimony of various witnesses and what the import of their testimony is throughout the trial, being an invasion of the jury's province" (R.p. 2603.)

(I) The court adopted a unique method of concentrating attention upon every circumstance which might be re-

garded as pointing to guilt and yet, disregarding the numerous circumstances developed on cross-examination which would negative such inference. Under the pretext that the court wished to assist the jury by segregating all of the incriminatory matter against the several defendants, the court restricted its review of the facts (R.p. 3903, et seq.) to a recitation of all of the incriminatory statements made by Bernstein and Magoon against the petitioner. Exceptions to this charge were made in the absence of the jurymen since the court refused to permit their presence during counsel's exceptions thereto (R.p. 3968).

(J) The Court erroneously charged on reasonable doubt (R.p. 3930) and further damaged the interest of defendants on a request to charge by asserting, "I think it is up to you not to hook me that way" (R.p. 3959).

(K) The Court further damaged the interest of the defendant in its main charge by stating, "When rogues fall out, it is a wise man's delight" (R.p. 3903), and then very naively offered to withdraw the remark saying, "It is just one of those things that do not amount to anything" (R.p. 3974).

(L) The Court upon being requested to charge that "one accomplice cannot corroborate the testimony of another accomplice" aggravated conditions by modifying its charge and stating: "I will modify it in this respect. He may not corroborate it, standing alone, to an extent sufficient to entitle the jury to accept the other accomplice's word. The corroboration by outside testimony which tends to connect the defendant with the commission of the crime must come from a non-accomplice, but the testimony of every accomplice witness, other than aforesaid, may be considered by the jury for what probative value it is worth, but not as sufficiently corroborative to accept

another accomplice's testimony." This charge was definitely erroneous (*People* v. *Nitzberg*, 287 N. Y. 183; *People* v. *O'Farrell*, 175 N. Y. 323 at 327).

(M) The Court erroneously admitted testimony of the witnesses Rubin and Berger with reference to union activities and gangsterism commencing in the year 1923 which seriously prejudiced the rights of defendant Capone (R.pp. 1293-1321; 1781-1802). This testimony was in nowise connected with the Rosen killing, but, nevertheless, a motion for a mistrial was denied (R.pp. 1492; 1877).

In respect to the foregoing, even Chief Judge Lehman, who voted for affirmance, admitted in his opinion:

> "True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded." (R.p. 4077-8).

Judge Loughran, one of the dissenting judges, in his opinion fully agreed with the above contentions of the defendant Capone (R.pp. 4078-4090).

The summation of the district attorney conveyed to the jury an erroneous accent upon the assertion by the defendants (none of whom took the stand) of their constitutional privilege against self-incrimination, and his actions throughout the trial and during summation were highly improper, inflammatory and prejudicial to the in-

terest of the defendant Capone, and prevented the jury from a fair deliberation of the issues involved.

Our system of jurisprudence has maintained one proposition as a beacon of our enlightenment—that a defendant accused of crime is entitled to a fair and impartial trial. This has been scrupulously maintained by our appellate courts when individuals, always human, have by attack on public welfare become blinded to justice by the desire for vengeance in the name of public interest.

Berger v. *U. S.*, 295 U. S. 78;
Graves v. *U. S.*, 150 U. S. 118;
Wilson v. *U. S.*, 149 U. S. 60;
Hall v. *U. S.*, 150 U. S. 76;
People v. *Malkin*, 250 N. Y. 185;
People v. *Slover*, 232 N. Y. 264.

That the prosecuting attorney in any case has much to do with the manner of conduct of the trial and that he can influence the atmosphere of such trial is clear. That there is a burden upon the district attorney as a quasi-judicial officer to aid and maintain the proper judicial atmosphere, and in doing so, to prosecute the defendant solely on the facts of the case and by legitimate methods is well recognized. Improper questions, statements not based upon evidence, browbeating of witnesses, and excessive argumentativeness is forbidden. All these are prohibited because they tend to distract the minds of the jurors from the actual facts and real issues and create against the defendant a prejudice born of the fact that the district attorney is recognized as a public officer who has apparently no interest in the case and who is at heart an altruist and interested solely in obaining justice.

A study of the record in the instant case discloses that this defendant did not receive the fair and impartial trial

to which every defendant is entitled. It also discloses that the prosecuting attorney went beyond the limits of non partisanship and impartiality and attacked the defendant and the case with the virulence and venom of the nearly barbaric advocate who tilted in the lists for the case of his principal. But the age of defenders and trials by combat have long since gone. Our civilization at least in its penal law and procedure prides itself on having through evolution clearly annihilated primitiveness and barbarity. Yet, occasionally as here, our consciousness of civilization is pricked by ugly throwbacks.

The entire summation of the District Attorney constituted an appeal to passion and contained numerous errors which seriously prejudiced the rights of this defendant. Although it is customary to object to these statements when made, counsel for all defendants were instructed and admonished by the Court that the District Attorney's summation was not to be interrupted (R.p. 3782). When one of defense counsel disobeyed this admonition, he was admonished by the court that there would be no further interruptionsbut that all exceptions would have to be taken at the conclusion of the summation (R.p. 3821). The objections were, therefore, made after the conclusion of the summation and under the further instructions from the court, in the absence of the jury (R.p. 3860), thereby depriving the jury of the knowledge of counsels' objection to various portions of the summation. The reason for the failure to interrupt the district atorney was then stated (R.p. 3864), and a motion for a mistrial made briefly setting forth the grounds therefor (R.pp. 3864; 3869-70), since the court informed counsel that it was not proper and would serve no useful purpose to enlarge thereon (R.pp. 3939; 3861-4; 3865-9).

With the evident intent of inducing the jury to believe that the testimony of the accomplice Bernstein in relation to his narration of the details of the crime itself and the participants therein was true, the District Attorney utilized over one-third of the summation in enumerating facts which were peculiarly within the knowledge of said accomplice and could not be disputed by the defendant, but which did not tend to connect him with the crime.

At the outset, he directed the jury's attention to the fact that thirty-five witnesses and fifty-eight exhibits were introduced (R.p. 3784), and urged them to analyze and reason as "I will take you through the opening statement, sentence by sentence, paragraph by paragraph, to refresh your recollection, if that, indeed, needs any, that every fact stated therein has been conclusively proven and that the guilt of Lepke, Capone and Weiss has been established beyond a shadow of a doubt" (R.p. 3785). Thereafter, constantly using the phrase, "Continuing with the opening and representation of the proof that the District Attorney of this County said would be submitted to you," or words to like effect, he narrated in detail how a uniformed officer, hearing the cry of "Police—Murder," quickly ran to a civilian, then into the candy store and there found Rosen, describing in detail the condition of Rosen in the store (R.pp. 3785-6); how the police officer questioned the tailor across the street and received the license of the automobile; how the police officers, ambulance surgeon, medical examiner arrived; the taking of photographs by detectives at the scene, the removal of the body and its identification by the son (R. pp. 3786-7). He described in detail the course of each bullet (R. pp. 3787-8), the recovery of same and how they were turned over to the Police Department (R.p. 3788). He described the abandoned automobile and the photo-

graphs taken of it (R.pp. 3789, 3790). He described what the operator of the newsstand saw and how the abandoned Chevrolet was stolen (R.pp. 3790-1), even stating, "Didn't we bring from Peoria, Illinois, the owner of that automobile?" • • • and the policeman that received the alarm? • • • and the picture designating "the very spot where the car was stolen from?" (R.p. 3792). He described the theft of the license plates, how the detectives found the broken padlock, and how the owner of the car testified regarding their theft (R.pp. 3792-3). He described the investigation of the police for fingerprints (R.p. 3793). He then described the finding of the gun by a citizen, the delivery of it to a police officer (R.p. 3794) and its subsequent delivery to the Ballistic Bureau (R.pp. 3795-6), whose examination and findings on the various bullets he described in detail (R.pp. 3796-7). He then described and exhibited a photostatic copy of the appointment of Special Prosecutor Dewey (R.p. 3801) and, also, read the entire indictment to the jury explaining that he had informed them in the opening that an indictment had been found—and wasn't it TRUE? (R. pp. 3805-6).

He continuously reminded the jury of the fact that he was reading sentence by sentence from his opening and constantly interrupted his summation and interjected the word "True?"—and asked, "Is there a single word, in the representation of proof that has not been established beyond a shadow of doubt?" He would also ask of the jury whether there was *anyone in the courtroom* who could deny each and every one of these facts had been proven?

All of these facts, which he was impressing upon the jury as true, were in nowise disputed by the defendant Capone, did not tend to connect him with the crime and were peculiarly within the knowledge of the accomplice

Bernstein. The error was further aggravated by the statement made by him (after narrating all of these undisputed circumstances) to the jury, "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody say to you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?"; and as to the other circumstances relating to the police officer, the tailor who turned in the alarm, the grocer, the medical examiner, the ambulance surgeon, the owner of the stolen car, the owner of the stolen plates and the newsstand operator, he further inquired of the jury whether there was any one person in the courtroom that could deny that each and every fact therein stated had been proven. This portion of the summation was intended to convince the jury that since the District Attorney had, in effect, undisputably corroborated the testimony of the accomplice Bernstein in these factual details, thereby demonstrating his truthfulness concerning same, therefore, the remainder of Bernstein's testimony tending to connect the defendant with the crime must likewise be true.

The defendant Capone rested upon the People's case. In the course of summation, the District Attorney made the following statement:

> "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody say to you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?" (R.p. 3806)

This statement was highly improper and accomplished by indirection what the District Attorney could not openly and directly state, to wit: that the defendant did not take

the stand or offer any proof in his own behalf. At the conclusion of the summation, the defendant Capone took exception, in the absence of the jury, to the reference herein made (R.p. 3870). As stated by Judge Loughran in the instant case, "This was a direct violation of the defendant's constitutional rights against self incrimination" (R.p. 4086).

We have established that over one-third of the summation dealt with the factual testimony not connecting any of the defendants with the crime. Much of the remaining time was spent in dealing with the activities of the Union and Rosen's and Rubin's travels and activities. Constant reference was also made throughout the remainder of the summation to what other persons in the courtroom, exclusive of the jury, as well as other lawyers in the courtroom seated in the opposite jury box, thought, according to the prosecutor, about the guilt of the defendant and as to whether any of them were in doubt as to the representation of proof the District Attorney claimed he had presented (R. pp. 3786, 3790, 3792, 3793, 3794, 3797, 3804).

At another point in the summation, he referred to the Goldstein and Strauss case, alleging that Judge Talley had lifted a part of his summation therefrom without benefit of the author (R.p. 3784). During the course of his summation, he exhibited the gun to the jury, and was told by the court to lay it aside.

He referred to the pay received by defense counsel as "tainted money" and stated that if defense counsel did not know that it was a hopeless case when they received their retainer, there is no lawyer in the courtroom that does not know it now, thereby implying that defense counsel knew that the defendants were guilty (R.p. 3804).

After his mention that the Rosen murder was a challenge to Judge O'Dwyer and his entire staff (R.p. 3807), he described how the police swept down on Brownsville and the people scattered to the four winds. He then inquired of the jury whether they thought that "Judge O'Dwyer sat down and out of seven million people in New York City or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt" (R.p. 3807).

He raised a false issue regarding the integrity of the District Attorney and his office by stating that Judge O'Dwyer, he and others who had something to do with the case were accused of murdering or attempting to kill the defendants (R.pp. 3803-4), and later requested the jury to use their head and imagine what went on in the District Attorney's office when the District Attorney saw a challenge like the Rosen case and other matters he wanted to investigate (R.pp. 3814-5). He reiterated, "Judge O'Dwyer and the rest of his staff—would they sit by and let Rubin or anybody pick three people out of seven million and send them up on a false murder charge?" (R.p. 3856), again pitting the integrity of the District Attorney's office against the guilt or innocence of the defendants. Finally, he conveyed to the jury the District Attorney's firm belief in the guilt of the defendants, using the following language, "for if they had not been three of the killers of Rosen, you would not have been sitting here" (R.p. 3820).

In an attempt to justify Bernstein's falsehoods relating to his opportunity to write letters, he referred to the desire of Bernstein to protect some employee in the hotel (there being no evidence to that effect), and he referred to the right of convicts in Sing Sing to write letters (R.p. 3809).

He assured the jury that they did not have to worry about what was going to happen to the witnesses in this case, and stated:

> "Don't let anybody fool you with Christmas-present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the courts and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want" (R.p. 3879).

It will be remembered that soon after the trial both Bernstein and Berger were set scot free, and paid considerable money by the State for the time spent in first class hotels as material witnesses. It would be fantastic to believe that the prosecuting attorney was telling the truth, when he made the foregoing statements to the jury, that he actually did not know that these murderers were to be set free.

He further emphasized the error committed by the Court in respect to the charge of attempted spoilation of evidence on the part of Capone by referring to same as evidence of his guilt (R.p. 3839).

He made improper references to defendants and defense counsel (R.pp. 3818, 3839-48).

During the trial, the District Attorney was permitted to prove the alleged association of the witness and of the defendant with Martin "Buggsy" Goldstein, Harry "Happy" Maione, Frank "the Dasher" Abbandando and Abraham Reles (R.pp. 698-9; 2431-2), although these named persons had no connection with the case at bar.

The evident purpose of introducing this testimony was

to prejudice the defendant in the eyes of the jurors, at least two of whom had been called in the case of *People v. Maione and Abbandando* and knew the result thereof. The question of the qualifications of these two jurors, Rorke and Link, has been previously discussed herein.

A summary finds that the prosecuting attorney in his zeal was guilty of almost every act of misconduct which has many times been proclaimed error:

> "Altercations between counsel, including imputation as to veracity, interjection of prejudicial matter by way of remarks during the trial, asking incompetent questions, merely for purpose of prejudice, the improper browbeating of witnesses, • • • improper argument to the jury." 26 Ruling Case Law 1022.
>
> "Persistence of the prosecuting attorney in asking improper questions in order to prejudice the jury may amount to such misconduct as to require a new trial." (Citing:) *State* v. *Greenland*, 125 Iowa 141; *Baldwin* v. *State*, 11 Oklahoma Criminal Reports, 228; *State* v. *Roscon*, 119 Iowa 390; Corpus Juris, Vol. 16, p. 1143.
>
> "A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. • • • Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit • • • To bring forward in argument an assertion of fact • • • is to become a witness; and to be a witness without being subjected to cross examination is to violate the fundamental principle of the Hearsay rule." 3 Wigmore Evid. 837.
>
> "The same general principle governs the putting of questions to witnesses. The jury may under

> certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question." Id. 850.

That the misconduct of counsel for the prosecution during the trial prejudiced the defendant and his case so as to deprive him of a fair and impartial trial is clear. *Johnson* v. *U. S.*, 131 C. C. A. 613, 3 Wigmore Evid. §1808; *Berger* v. *U. S.*, supra, *Graves* v. *U. S.*, supra, *Hall* v. *U. S.*, supra, *Wilson* v. *U. S.*, supra.

CONCLUSION

The jurisdiction of this Court is invoked by reason of the denial to the petitioner of his constitutional rights to a fair trial as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. This point was previously raised in the Court below where it was considered and necessarily passed upon. (See Remittitur of the Court of Appeals R.pp. 4028).

It is contended on all of the foregoing specification of errors that a Writ of Certiorari for a review of the judgment of conviction herein should issue. The judgment of conviction herein was not obtained by due process of law; it resulted from the mere pretense or semblance of a trial. This departure from the proper course of trial proceedings was grossly unfair and improper and calls for this Court's power of supervision over such proceedings. As was said by Mr. Justice Roberts of this Court in *Lisenba* v. *California* (decided by Supreme Court of the United States, October Term, 1941):

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In

order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial.'

To the same effect see

Moore v. *Dempsey*, 261 U. S. 86;
Norris v. *Alabama*, 294 U. S. 589.

It is respectfully submitted that the prejudicial and inflammatory newspaper publicity directed against the petitioners herein prior to the trial; the denial of the numerous motions for a severance made on behalf of this petitioner; the atmosphere in the courtroom and the conduct of the trial; the seating of a prejudiced and biased jury; the conduct of the trial judge; and the misconduct of the prosecutor, condoned and permitted by the trial Court, was as much a denial of due process of law as the domination of a Court by mob violence, since in such case, while there is the form of a hearing, a hearing in substance, within the meaning of due process of law, is denied.

It is therefore respectfully prayed that a Writ of Certiorari issue to the Court of Appeals of the State of New York and the County Court of Kings County of the State of New York, for a review of the judgment of conviction convicting the petitioner herein of the crime of murder in the first degree.

Respectfully submitted,

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